involves pastoral counseling of priests with special medical and emotional needs, such as, alcoholism, depression, other emotional disorders including ephebophilia, cancer, heart disease, etc. SA Ex. 2 at 25:13-18 (citing Cox Decl. ¶ 10); SA Ex. 3 at 78:5-12. The exact documents are described in the Petition for Writ of Mandate to the Court of Appeal. SA Ex. 4 at 166-79. In brief, the documents are letters from the target priests to the bishop or vicar. Letters from the bishop or vicar to the priest. Notes of the Vicar of meetings with the priest. Memos from the Vicar to the bishop and back. All of the documents relate to the pastoral counseling of the Vicar for Clergy and cover the usual course of events in the evaluation and treatment of child sexual abuse from initial denial, residential therapy, confession, correspondence regarding progress of treatment, aftercare contracts restricting activities, and monitoring through assignments to ministries not involving children. Ex. 2 at 30:2-18 (citing Cox Decl. ¶ 28); Ex. 3 at 79:24-80:3; SA Ex. 4 at 166-79.

This petition raises issues of national importance because hundreds of clergy abuse cases are pending in California and around the country and these or similar church records are being sought in over 500 cases pending against the Archdiocese of Los Angeles, and in hundreds of additional cases pending against other Roman Catholic dioceses and religious orders, and other churches and denominations.

More specifically, this petition seeks review of the Court of Appeal's decision in *Roman Catholic Archbishop of Los Angeles v. Superior Court,* 131 Cal. App. 4th 417 (2005),which ruled that fourteen documents relating to the confession, reconciliation and rehabilitation of two priests should be turned over to the Grand Jury, thereby

overruling Petitioner's objection that the documents and the communications reflected therein are protected from disclosure by the Religion Clauses of the First Amendment. SA Ex. 2 at 24:1-5, 24:5-41:23; SA Ex. 3 at 76:21-89:16; App. at 6, 10-11 & n.5, 64 (131 Cal. App. 4th at 426-27, 429-30 & n.5, 463).

A. Theology Of The Bishop-Priest Relationship.

Bishops are responsible within their dioceses as pastors, teachers, ministers of the sacraments and administrators of the governance of the Church. SA Ex. 2 at 24:22-24 (citing Ex. 3 thereto, Canon 275); SA Ex. 3 at 77:22-25. In particular, a bishop is to have a special concern for his priests. SA Ex. 2 at 24:24-25 (citing Ex. 3, Canon 384); SA Ex. 3 at 77:24-25. He is to ensure that they fulfill the obligations proper to their state. SA Ex. 2 at 24:25-26. He is to see that they have the means needed for the development of their spiritual and intellectual lives, as well as adequate means of livelihood and social welfare. SA Ex. 2 at 24:26-28.

While priests owe a special obligation to show reverence and obedience to the Supreme Pontiff and their own bishop, bishops have the burden of sanctifying their priests. SA Ex. 2 at 26:6-7; SA Ex. 3 at 78:12-13; App. at 6 (131 Cal. App. 4th at 427). As the New Commentary on the Code of Canon Law states:

> The bishop for his part has a "sacred duty" to know his priests individually and intimately – "their character and talents, their likes and dislikes, their spiritual life, zeal and plans, their health and economic situation, their family and whatever concerns them . . . in sincere, friendly dialogue, he converses with them about their work, the offices entrusted to them and also

> about matters pertaining to the life of the whole diocese."

SA Ex. 2 at 26:8-13 (quoting Ex. 3 at 351).

This relationship of bishop to priest is summarized in the Dogmatic Constitution on the Church (*Lumen Gentium*) as follows:

> By reason of this sharing in the priesthood and mission of the bishop the priests should see in him a true *father* and obey him with all respect. The bishop, on his side, should treat the priests, his helpers, as his *sons* and friends, just as Christ calls his disciples no longer servants but friends.

SA Ex. 2 at 26:19-24 (quoting Ex. 4 at 386 ¶ 28); *cf.* SA Ex. 3 at 78:12-14. The fundamental imperative in this pastoral relationship of father to son obligates the bishop to care for and treat as part of his religious undertaking any emotional, physical or spiritual problem a priest may be experiencing. SA Ex. 2 at 26:24-26 (citing Cox. Decl. ¶ 16; Mahony Decl. ¶¶ 15-16); SA Ex. 3 at 78:14-18; App. at 6-7 (131 Cal. App. 4th at 427).

Accordingly, the bishop, as father in both the pastoral sense of caring for his son's health and as father in the episcopal sense of administering the diocese, is obliged to intervene and judge inappropriate conduct of any priest and to impose restrictions and penalties in accord with the norms of law as appropriate in his moral judgment. SA Ex. 2 at 27:15-17 (citing Cox Decl. ¶ 18); SA Ex. 3 at 78:20-24; App. at 7 (131 Cal. App. 4th at 427). Thus, the bishop has the religious right and duty to discuss with his priests matters of sexuality and their ability to fulfill the obligation of celibacy. SA Ex. 2 at 27:17-18; SA Ex. 3 at 78:24-26.

To accomplish this, there must be open communication between the bishop and his priests comparable to the kind of communication that is needed between parents and children and between spouses. SA Ex. 2 at 27:18-21; SA Ex. 3 at 78:25-27; App. at 7 (131 Cal. App. 4th at 427).

Based on the fundamental religious relationship between a bishop and his priests, the priest is encouraged to communicate his deepest psychological and sexual issues, to undergo psychiatric evaluation and treatment, and to share the results of his therapy with the Bishop. SA Ex. 2 at 28:16-18 (citing Cox Decl. ¶¶ 21-22); SA Ex. 3 at 79:4-13; 83:10-12; App. at 7-8 (131 Cal. App. 4th at 428). All of this is undertaken for the purpose of the ongoing sanctification of the priest and the welfare of the church. SA Ex. 2 at 28:18-20 (citing Cox Decl. ¶¶ 21-22); SA Ex. 3 at 79:11-13, 83:13-14; App. at 8 (131 Cal. App. 4th at 428).

The ongoing sanctification of the individual priests, including the bishop's ability to confidentially evaluate sexual misconduct and provide appropriate counseling and therapy, is fundamental to the mission of the Church because the priests are the primary leaders of the Church and each priest represents "the presence of Christ," "embodying His way of life and making Him visible in the midst of the flock entrusted to their care." SA Ex. 2 at 30:19-23 (citing Ex. 8 ¶ 14 and Cox Decl. ¶ 29); SA Ex. 3 at 80:4-7.

Public disclosure of the intervention, subsequent psychological evaluation and treatment, and discussion of restrictions on the priests will destroy the confidentiality and trust between the bishop and his priests, which are essential to the sanctification process described above. SA Ex. 2 at 30:24-26 (citing Cox Decl. ¶ 31); SA Ex. 3 at 80:6-10.

In fact, since the issuance of these criminal subpoenas has become common knowledge, priests involved in recent interventions have refused to discuss the allegations, have retained attorneys and have refused to undergo psychological evaluation. SA Ex. 2 at 30:26-31:1 (citing Cox Decl. ¶ 31). In substance, the ability of the bishop to counsel with his priests about their individual difficulties in the area of human sexuality has been grievously harmed, the practice and exercise of the religion impaired and the life of the Church proscribed by the actions of the State. SA Ex. 2 at 31:1-4 (citing Cox Decl. ¶ 31).

The bishop's pastoral care of a troubled priest is no different than a priest's pastoral care of a troubled parishioner who comes to him seeking consolation and support for a personal problem, such as, alcoholism, infidelity, spousal abuse, depression or other mental disorder. The bishop's episcopal role in the care of a priest intensifies the religious nature of the relationship because besides spiritually and emotionally supporting the troubled priest, the bishop is administering the church itself as the priest is a leader within the church. *See* SA Ex. 2 at 30:19-23 (citing Ex. 8 ¶ 14 and Cox Decl. ¶ 29); SA Ex. 3 at 80:4-7.

The District Attorney has not disputed the theology of the bishop-priest relationship, including the financial dependence of priests on their bishop for mental health care, and the bishop's moral obligation to support his priests with their emotional and spiritual needs, to discipline them to reform their lives, and to work diligently to sanctify each priest by means of reconciliation and rehabilitation.

The District Attorney has not disputed that the bishop's intervention and continuing support of a troubled

priest was always held confidential during the times when the subject communications occurred. These subpoenas are a direct result of the pressure of the media and victims' advocates on the District Attorney after the events of 2002 in Boston. No prosecutor in this State has ever sought these records before; yet priests have been convicted over the years based upon normal secular evidence consisting of the testimony of the usual complement of multiple victims, the testimony of persons who witnessed the victims in the frequent accompaniment of the accused, letters of endearment from the accused, confessions of the accused, and other standard secular evidence.

In sum, the District Attorney has not contended that there was anything criminal, illegal or even immoral with pastoral and episcopal counseling of troubled priests. In fact, the District Attorney can not dispute that confidentiality in professional counseling, whether it is legal, psychological or spiritual, is necessary to promote prompt intervention and effective counseling.

B. Procedural History.

Starting in June 2002, the Los Angeles County Grand Jury issued 30 subpoenas duces tecum to the Archdiocese's custodian of records. SA Ex. 4 at 148 ¶ 15.

On June 25, 2004, the Superior Court quashed all of the subpoenas. However, the District Attorney was granted leave to serve two new subpoenas requesting the same documents upon an assurance and subsequent showing made to the Grand Jury that the People were investigating complaints against the target priests within the statute of limitations as required by *Stogner v. California*, 539 U.S.

607 (2003). App. at 4 (131 Cal. App. 4th at 426); SA Ex. 4 at 148-49 ¶ 19.

On June 30, 2004, the Grand Jury issued two new grand jury subpoenas commanding the Archdiocese to produce any documents "that relate in any way to allegations of child molestation or sexual abuse committed by" two identified target priests. App. at 4 (131 Cal. App. 4th at 426); SA Ex. 4 at 149 ¶ 20; SA Ex. 5 at 255-58.

On July 9, 2004, counsel for the two priests named in the new subpoenas filed a new motion to quash. The parties stipulated that all of the briefing, objections and documents previously presented to the Superior Court would be deemed applicable to the new subpoenas, including Petitioner's motion to quash, filed April 1, 2003, which objected to production based upon the Religion Clauses of the First Amendment. SA Ex. 4 at 148-49 ¶¶ 17, 21, 22; SA Ex. 2 at 31-41.

On September 7, 2004, the Superior Court issued its ruling, sustaining some objections and overruling others. App. at 5 (131 Cal. App. 4th at 426); SA Ex. 4 at 149 ¶ 23; SA Ex. 3 at 98-121. The Court overruled the Religion Clause objections, stating that the subpoenas were "a secular act under the triparte [sic] test of *Lemon v. Kurtzman* (1971) 403 U.S. 602," and that enforcement of the subpoenas "does *not* inhibit the practice of the Roman Catholic religion," nor result in "excessive government entanglement with religion." SA Ex. 3 at 82:4-8. Later, the Court reiterated that production of the documents would not be "an improper interference or entanglement with religion." SA Ex. 3 at 89:10-11.

On January 21, 2004, petitioner filed a petition for writ of mandate to obtain a review of the ruling concerning

fifteen documents. App. at 5 (131 Cal. App. 4th at 426); SA Ex. 4 at 166-79. The petition for writ of mandate again raised the protection of the Religion Clauses as one of the issues for review. App. at 6, 10 (131 Cal. App. 4th at 426-27, 429); SA Ex. 4 at 139, 150-51 (¶¶ 29 & 33), 196-224. On July 25, 2005, the Court of Appeal issued its order granting the relief requested concerning one document, but denying relief concerning the remaining fourteen. App. at 12-28, 64 (131 Cal. App. 4th at 430-40, 463. The Court of Appeal held that the Free Exercise claim was "defeated by *Smith*" in that the subpoenas were neutral and of general applicability, App. at 12, 16-18 (131 Cal. App. 4th at 431, 433-34); that the Establishment Clause claim was barred because "the primary effect of enforcing the subpoenas will not require the government either to interfere with the internal workings of the Archdiocese, or to choose between competing religious doctrines," App. at 18 (131 Cal. App. 4th at 434); and that the ecclesiastical limitation cases did not apply because "the case at bar is not, at its core, an *internal* church dispute," App. at 15 (131 Cal. App. 4th at 432).

On September 2, 2005, petitioner filed a petition for review in the Supreme Court of California (Case No. S136939) raising the same arguments as below concerning the protection of the Religion Clauses. The Supreme Court denied review on November 16, 2005. App. at 65.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. State-compelled disclosure and government review of confidential, pastoral counseling by members of the clergy inescapably entangles the State in the internal religious life of churches in violation of the Establishment Clause and destroys pastoral counseling of churches in violation of the Free Exercise Clause.

At the heart of any religious system is the ability of individual believers to seek and obtain direction and reconciliation for any sins they may have committed. These subpoenas intrude into a church's internal process of reconciliation and rehabilitation of its clergy – men consecrated to the priesthood. The Court of Appeal held that this Court's cases barring judicial inquiry into ecclesiastical matter do not apply because "the case at bar is not, at its core, an *internal* church dispute." App. at 15 & n.6 (131 Cal. App. 4th at 432 & n.6). Th reading of the cases is too narrow and fails to recognize the broader principle underlying this Court's decisions.[2] It also is inconsistent with lower federal court cases that have applied the constitutional limitation outside the context of internal church disputes.

A number of state and federal courts have recognized that state inquiry into church doctrine, practice and governance can occur, and can be just as harmful, in third-party-initiated criminal and tort cases against a church as

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[2] This Court's leading "ecclesiastical limitation" cases include *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); and *Watson v. Jones*, 80 U.S. 679 (1872).

in cases involving internal church disputes over dogma, control of church property or ministerial appointments. It is not surprising, therefore, that the limitation of the First Amendment on inquiry into ecclesiastical matter has been applied in cases that cannot be distinguished as internal church disputes. *See, e.g., NLRB v Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (unionization of parochial schools); *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999) (sexual harassment); *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997) (non-confessional counseling of prison inmates); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (sexual harassment); *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257 (2003) (sexual relationship induced by religious reverence for priest).

Former California Supreme Court Justice Brown, in her dissenting opinion in *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527 (2004), noted that the "logic" of the ministerial exception and church autonomy cases

> suggests that the *constitutionally protected space* for religious organizations is actually *broader than these obvious categories*. In short, the ministerial exception and the church autonomy doctrine are ways of describing *spheres of constitutionally required protection*, but these categories are *not exhaustive*.

Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal. 4th 527, 574-75 (2004), *cert. denied*, 543 U.S. 816 (2004) (dissenting op.) (emphasis added). Justice Brown thus implicitly recognized the need for this Court to settle whether the ecclesiastical limitation doctrine should be applied to cases that do not involve internal church disputes,

in order to prevent intrusions into constitutionally-protected spheres.

Even if the absolute bar of the ecclesiastical limitation cases arguably did not apply, state review of confidential, pastoral counseling by members of the clergy inherently entangles the state in the internal religious life of churches and intrudes into religious practice. Against the undisputed, admissible evidence that these subpoenas had chilled and then destroyed pastoral counseling of the Archdiocese, the Court of Appeal peremptorily rejected Petitioner's Free Exercise and Establishment Clause objections "because the primary effect of enforcing the subpoenas will not require the government either to interfere with the internal workings of the Archdiocese, or to choose between competing religious doctrines." App. at 18 (131 Cal. App. 4th at 434). The Court therefore concluded that "disclosure of the subpoenaed documents to the grand jury will not result in excessive entanglement or any other violation of the *establishment clause*," App. at 21 (131 Cal. App. 4th at 436 (emphasis in original)), and would not violate the Free Exercise Clause because the subpoenas were "a valid and neutral law of general applicability that will have, at most, an incidental effect on the Archdiocese's practice of keeping confidential the communications" at issue. App. at 18 (131 Cal. App. 4th at 434).

Unless certiorari is granted, the effect of the subpoenas will be to compel disclosure of deeply personal and intimate discussions of priests with their bishop for the purpose of confessing their sins, obtaining spiritual, emotional, and psychological assistance to overcome their emotional disorders, and thus to live in conformity with their religious vows. Since the facts are undisputed, it must be accepted as a matter of law that disclosure of these discussions will chill and destroy the pastoral

relationship between the bishop and his priests. SA Ex. 2 at 30:34-31:4 (citing Cox Decl. ¶ 31); SA Ex. 3 at 80:4-10.

Under the Establishment Clause, monitoring church activities, such as subpoenaing documents and testimony concerning bishop-priest counseling, constitutes excessive entanglement of the government with religion. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court held that the end result of recognizing NLRB jurisdiction over parochial schools would be excessive entanglement over the terms and conditions of teacher employment, which would unconstitutionally interfere with the bishop's right to control the religious content of the instructional material being used and the selection and comportment of the individuals who act as teachers and examples for the students. As this Court noted, it is not just the state's ultimate control over the terms of employment, but "the very process of inquiry" leading to that result which violates the First Amendment. *Id.* at 502.

The Court of Appeal's attempt to distinguish *Catholic Bishop of Chicago* is illusory. App. at 19-20 (131 Cal. App. 4th at 435). The issue in that case was whether the NLRB could exercise jurisdiction over parochial schools as opposed to some isolated, non-religious "unfair labor practice" as the Court of Appeal posited. *Id.*

In *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970), this Court compared the exemption of church property from taxation with the taxation of such property. The Court employed an "end result" Establishment Clause analysis, reasoning that taxation would entail "excessive government entanglement with religion" by "giving rise to tax valuation of church property, tax liens, tax foreclosures,

and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.* at 674.

In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), this Court articulated three "tests" gleaned from prior Establishment Clause decisions:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [citation], finally, **the statute must not foster "an excessive government entanglement with religion."** *Walz,* [397 U.S.] at 674.

Id. at 613 (emphasis added).

The lower federal courts have applied the same "end result" analysis employed in *Walz* and *Lemon* to establish excessive entanglement. In *Surinach v. Pesquera De Busquets*, 604 F.2d 73 (1st Cir. 1979), for instance, the First Circuit held that an administrative price control investigation of a diocese violated the Establishment Clause because the end result of the investigation might be an injunction preventing the diocese from raising, or forcing it to lower, the tuition it charged at its parochial schools, which "could interfere seriously with [the] religious duties [the school felt it owed its students and their parents]." *Id.* at 77.

Similarly, in *Word of Faith World Outreach Center Church, Inc. v. Morales,* 787 F. Supp. 689 (W.D. Tex. 1992), *rev'd on other grounds by* 986 F.2d 962 (5th Cir. 1993), *cert. denied,* 510 U.S. 823 (1993), the District Court held that an investigation by the Texas Attorney General under the Deceptive Trade Practices-Consumer Protection Act (DTPA) violated the Establishment Clause because it

might result in an injunction allowing the Attorney General to monitor or restrict the content of the church's pamphlets, advertisements, television broadcasts and sermons for deceptive statements. 787 F. Supp. at 701. Applying the same *Walz/Lemon* "end result" analysis employed in *Surinach*, the *Morales* court explained:

> [T]he nature of the injunctive relief authorized by the DTPA . . . is such that the "end result" is "an excessive government entanglement with religion." *See Walz v. Tax Comm' of New York*, 397 U.S. 664, 674, . . . ; *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 76 (1st Cir. 1979).

Morales, 787 F. Supp. at 701.

Here, the State's compelled disclosure and scrutiny of the Church's files interferes with and intrudes into personal, pastoral and episcopal counseling that is far more intimate and religious than the terms and conditions of teacher employment agreements in *Catholic Bishop of Chicago*, the financial records of the diocese in *Surinach*, or the *public* sermons, pamphlets and advertisements of the church in *Word of Faith*.

The impact of the subpoenas here is immediate. This is not a situation where enforcement of the subpoenas *could* lead to a governmental decision (such as imposition of price controls or unionization of schools) that *could* clash with the church's desire to operate its schools in accordance with its religious principles. Here, enforcement of the subpoenas itself *will* effectively force the Church to discontinue a religious practice. Indeed, it has *already* done so.

Nor are these subpoenas "one-time" intrusions. They are merely the first step in an ongoing investigation that threatens dozens or even hundreds of similar subpoenas targeting other priests, and compelled testimony of the people who participated in the underlying communications.

Moreover, characterization of confidential, pastoral communications as non-religious activity impermissibly places the court in the unconstitutional position of deciding as a definitional matter what *is* religion. *See* SA Ex. 3 at 82:4-8, 12-18, 82:22-83:5, 86:3-7, 89:1-11; App. at 10 (131 Cal. App. 4th at 429); *see also Surinach v. Pesquera De Busquets*, 604 F.2d 73, 78-79 (1st Cir. 1979) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)); *Word of Faith World Outreach Center Church, Inc. v. Morales*, 787 F. Supp. 689, 702 (W.D. Tex. 1992), *rev'd on other grounds by* 986 F.2d 962 (5th Cir. 1993), *cert. denied*, 510 U.S. 823 (1993); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring op.) ("[D]etermining whether an activity is religious or secular . . . results in considerable ongoing government entanglement in religious affairs. [Citation.] Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity."). These records document counseling of priests by their bishop. This is a practice of the Archdiocese. It is a sacred (religious) duty of the bishop. It requires confidentiality to be effective. Any means of investigation, such as enforcement of a subpoena, that breaches this confidentiality, chills and in fact destroys a religious practice. Accordingly, the State, by seeking to enforce the subpoenas, has proscribed, chilled and destroyed a religious practice. This

intrudes into the free exercise of religion. It is mere bootstrapping to attempt to avoid this conclusion by characterizing the counseling as non-religious.

In sum, if compulsory government seizure and review of these documents, which destroys an important religious practice, does not inhibit the free exercise of religion or constitute excessive entanglement, then the First Amendment does *nothing* to protect religious institutions from untrammeled monitoring and surveillance by the State. Thus, certiorari is warranted since "a state court of last resort has decided an important federal question in a way that conflicts with the decision[s] . . . of a United States court of appeals" (in *Bollard* and *Elvig*), Sup. Ct. R. 10(b), and because "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court" (in *Catholic Bishop of Chicago*, *Milivojevic* and the other Supreme Court ecclesiastical limitation and First Amendment cases), Sup. Ct. R. 10(c).

B. Subpoenas directed at confidential, pastoral counseling by members of the clergy of the Roman Catholic religion are inherently *not* "neutral laws of general applicability" within the meaning of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), thus triggering the strict scrutiny test under the Free Exercise Clause of the First Amendment.

A grand jury subpoena is inherently *not* a neutral law of general applicability within the meaning of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). Instead, it is an act of a secret grand jury *targeting* the religious practices of the Roman Catholic Church, and is therefore subject to strict scrutiny under *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 546 (1993).

The Court of Appeal held that subpoenas are neutral laws of general application, stating that "[t]he neutral law of general applicability at issue here is the statutory and common law basis of California's grand jury process" and the fact that "this particular grand jury investigation and the subpoenas it generated" were directed at a Roman Catholic archdiocese was "merely an incidental effect of the grand jury process." App. at 17 (131 Cal. App. 4th at 433).

This Court, however, has never decided whether a court's analysis of a free exercise challenge should focus on general, procedural laws, such as the statutes authorizing grand juries to issue subpoenas, which are neutral and of general application on their face; or should focus instead on the specific judicial act in issue, which in this case is decidedly not neutral or of general applicability. The judicial act which is the governmental act at issue here is

directed at a particular religious practice of a specific Roman Catholic archdiocese.

The Court of Appeal's interpretation of the *Smith* test is subject to certiorari review because "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

C. Assuming that subpoenas targeted at the practices of the Roman Catholic religion are *not* neutral laws of general applicability within the meaning of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the State must make a case-specific factual showing to meet the strict scrutiny test.

In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), this Court held that if the state action burdening free exercise is not neutral and of general applicability, the pre-*Smith* strict scrutiny test must be applied. *Id.* at 531-32. Here, in applying the strict scrutiny test, the Court of Appeal held that "the grand jury's investigation into suspected child molestation serves a compelling state interest and is narrowly tailored to achieve that interest." App. at 23-25 & n.10 (131 Cal. App. 4th at 437-40 & n.10). The Court thus determined in conclusory fashion that under the strict scrutiny test a state's *general* interest in investigating suspected child molestation was sufficiently compelling to outweigh any accommodation to Petitioner's free exercise rights.

The Court of Appeal's interpretation of the strict scrutiny test, however, is in conflict with the decisions of this Court and several United States courts of appeals. The strict scrutiny test requires *case-specific factual findings*. Here, it would require findings based on the specific circumstances of the criminal complaints against the two target priests.

In *Smith,* Justice O'Connor explained why it is necessary for the court to make an *individualized assessment* as to whether the government's interest is compelling in a particular case:

> [W]e have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest". . . . To me, the sounder approach – the approach more consistent with our role as judges to decide each case on its individual merits – is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, **the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim**. *Cf. McDaniel,* 435 U.S., at 628, n. 8 (plurality opinion) (noting application of *Sherbert* to general criminal prohibitions and the "delicate balancing required by our decisions in" *Sherbert* and *Yoder*). Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries

> criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct.

Smith, 494 U.S. at 899-900 (O'Connor, J., concurring) (emphasis added); *cf. McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978) (a "delicate balancing" is required by *Sherbert v. Verner* and *Wisconsin v. Yoder* "when an important state interest is shown"); *Sherbert v. Verner*, 374 U.S. 398, 407-408 (1963) (no "compelling state interest" where government failed to prove that denying unemployment benefits to Seventh-Day Adventists was needed to prevent fraudulent claims by unscrupulous claimants feigning religious objections to working on Saturday); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("Where fundamental claims of religious freedom are at stake . . . we cannot accept such a sweeping claim [of a compelling state interest]; . . . we must *searchingly examine* the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption."); *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539, 542 (Wis. 1971) ("A compelling interest is *not just a general interest in the subject matter* but the need to apply the regulation without exception to attain the purposes and objectives of the legislation" (emphasis added).), *aff'd*, 406 U.S. 205 (1972); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1254-55 (D.N.M. 2002) (under RFRA's compelling interest test, "a court does not consider the prison regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the prison regulation to the individual claimant."), *aff'd*, 342 F.3d

1170 (10th Cir. 2003), *aff'd on rehearing en banc,* 389 F.3d 973, 1019, 1021 (10th Cir. 2004) ("generalized expressions of the government's interest in prohibiting *hoasca*" are insufficient; "generalized statements [concerning the dangers of all controlled substances] are of very limited utility in evaluating the specific dangers of *this* substance under *these* circumstances"; holding that under compelling interest test courts must conduct a "case-by-case evaluation of the controlled substances laws and the scheduling decisions made pursuant to those laws"; concluding that federal government had failed to show that its interests were compelling where evidence in support of that interest was "no better than 'in equipoise'"), *cert. granted sub nom., Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal,* 125 S. Ct. 1846 (2005); *Kikumura v. Hurley,* 242 F.3d 950, 962 (10th Cir. 2001) (followed by *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,* 282 F. Supp. 2d 1236, 1254 (D.N.M. 2002)); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 109 (1991) (citing *Yoder* for proposition that, "It is not the government's broad interest in enforcing a particular law that is weighed against a free exercise claim, but rather the government's narrow interest in refusing to make a free exercise exemption.").

In *Branzburg v. Hayes,* 408 U.S. 665 (1972), cited by the Court of Appeal, App. at 25 (131 Cal. App. 4th at 438), the three reporters who refused to testify were covering serious ongoing or contemplated criminal activity and this Court *did* make case-specific factual findings supported by affidavits submitted by the government:

> If the test is that the government "convincingly show a substantial relation between the information sought and a subject of overriding and compelling

> state interest," *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963), it is quite apparent that the State has the necessary interest in extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing the community from being disrupted by violent disorders endangering both persons and property . . . .

408 U.S. at 700-701; *cf. id.* at 710 (Powell, J. concurring) (court must balance First Amendment interest against government's interest on "case-by-case" basis). Based on personal eyewitness news accounts of criminal activity by the reporters and government-submitted affidavits, the Court reached the not-very-surprising conclusion that the seriousness of the criminal conduct and its ongoing nature outweighed a non-existent newspapermen's privilege.

In the unanimous opinion in *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), cited with approval in *Branzburg*, this Court found that the legislature's investigation into organizations whose principles included violence as a means of social change was not sufficiently compelling to outweigh the NAACP's right to maintain the confidentiality of its membership lists. *Id.* at 546, 550-51, 555, 557. Thus, the investigation of criminal activity in and of itself is not sufficient. This was a case-specific finding. *Id.*

In the other cases cited by the Court of Appeal, App. at 25-27 (131 Cal. App. 4th at 439), the courts did make case-specific factual findings of compelling state need. *See, e.g., In re Grand Jury Empaneling of the Special Grand Jury*, 171 F.3d 826 (3d Cir. 1999) (court weighed the need for the testimony of a rabbi's daughters who worked in his office to investigate a revenue crime against the religious

obligation of the daughters to honor their mother and father, and not surprisingly found the need for the testimony outweighed the burden on free exercise); *In re Three Children*, 24 F. Supp. 2d 389 (D.N.J. 1998) (similar facts); *Doe v. United States,* 842 F.2d 244 (10th Cir. 1988) (court weighed the government's need for various family members to testify against each other in a criminal investigation with the witnesses' self-proclaimed religious beliefs prohibiting them from testifying against any family member), *cert. denied,* 488 U.S. 894 (1988); *Congregation B'Nai Jonah v. Kuriansky*, 576 N.Y.S.2d 934, 936 (N.Y. App. Div. 1991) (court weighed the state's need for records of the Congregation concerning investigation of the Congregation for Medicaid fraud against the Congregation's "unpersuasive" contention that charitable contributions were made to it in confidence under a fundamental tenet of the Jewish faith.)

The Court of Appeal's interpretation of the *Smith* test is subject to certiorari review because "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

D. *Smith* is ripe for reconsideration.

This Court may grant certiorari to reconsider a prior Supreme Court case. *See, e.g., Afroyim v. Rusk,* 387 U.S. 253, 256 (1967). The Stern, Gressman treatise on Supreme Court Practice explains:

> Where a state court has relied upon a prior Supreme Court decision . . . that is now considered

> ripe for reconsideration and possible overruling or change, certiorari may be granted. *See, e.g., Malloy v. Hogan,* 378 U.S. 1 (1964); *Gideon v. Wainwright,* 372 U.S. 335 (1963). Such ripeness may be evidenced by statements of various Justices in recent opinions, by critical commentaries, or by "continuing * * * controversy and litigation in both state and federal courts" ([*Gideon,*] 372 U.S. at 338).

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 4.25(i), p. 273 (8th ed. 2002).

In *Lawrence v. Texas*, 539 U.S. 558, 563-64 (2003), this Court granted certiorari to consider whether a case handed down 17 years earlier should be overruled. Similarly in *Afroyim v. Rusk,* 387 U.S. at 255-56, this Court granted certiorari to reconsider a ten-year-old Supreme Court decision that had been decided by a 5-4 vote. Likewise in *Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 37, 47-49 (1977), this Court granted certiorari to reconsider an important antitrust case decided ten years before. *See also* Stern et al., *supra*, § 4.5, p. 234.

The Court of Appeal here relied on *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), to defeat Petitioner's Free Exercise objections. App. at 12-14, 16-18 (131 Cal. App. 4th at 430-34). *Smith* was handed down 16 years ago, and only five justices agreed that the compelling interest test should be rejected. 494 U.S. at 874-90 (majority op.). Not counting Justice O'Connor, who has announced her retirement, only three of the Justices sitting on the Court at that time remain on the Court. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), two currently-sitting Justices stated that *Smith* had been wrongly decided (Justices O'Connor and Breyer) and a

third currently-sitting Justice called for its reconsideration (Justice Souter). *Id.* at 544-66 (dissenting ops.); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-77 (1993) (Souter, J., concurring).

Significantly, the decision in *Smith* has no binding effect over the religious practice that was in issue in *Smith* itself because both Oregon and the United States have exempted the sacramental use of peyote from their respective drug enforcement laws. 42 U.S.C.S. § 1996a(b)(1) (2005); 21 C.F.R. § 1307.31 (2006); Or. Rev. St. § 475.992(5)(a)-(c) (2003). Thus, both the federal and state governments involved in the case have acknowledged that the free exercise of religion under the very facts of the *Smith* case should have been recognized.

Moreover, Congress passed the Religious Freedom Restoration Act to overrule *Smith* and restore the compelling interest test. 42 U.S.C.S. § 2000bb(a)(4) & (b)(1) (2005); *Ochs v. Thalacker*, 90 F.3d 293, 295 (8th Cir. 1996).[3]

In the wake of *Smith* and *City of Boerne v. Flores*, 521 U.S. 507 (1997), several states have enacted state Religious Freedom Restoration statutes and constitutional amendments that expressly reject the *Smith* standard in favor of the pre-*Smith* strict scrutiny standard set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963). *See, e.g.*, Ala. Const., amend. 622; Ariz. Rev. Stat. § 41-1493.01 (LexisNexis 2005); Fla. Stat. Ann. § 761.01 *et seq.* (2005); 775 Ill. Comp. Stat. Ann. 35/1 *et seq.* (2005); Mo. Rev. Stat. § 1.302 (2006); N.M. Stat. Ann. § 28-22-1 *et seq.*(2005); R.I.

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[3] Subsequently, in a case involving denial of a building permit to a church under a local zoning ordinance, this Court held that in passing RFRA Congress exceeded its powers under the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

Gen. Laws § 42-80.1-1 *et seq.* (2006); S.C. Code Ann. § 1-32-10 *et seq.* (2004); *see also* Brian L. Porto, *Validity, Construction, and Operation of State Religious Freedom Restoration Acts,* 116 A.L.R.5th 233 (2005).

State courts have registered their disagreement with *Smith*. *See, e.g., First Covenant Church v. City of Seattle,* 120 Wn.2d 203, 840 P.2d 174 (1992); *State v. Hershberger,* 462 N.W.2d 393 (Minn. 1990); *Humphrey v. Lane,* 2000 Ohio 435, 728 N.E.2d 1039 (2000).

States have declined to apply the *Smith* standard to the free exercise provisions in their own constitutions. *See, e.g., Larson v. Cooper,* 90 P.3d 125, 131-32 & n.31 (Alaska 2004), *cert. denied,* 2006 U.S. LEXIS 821 (Jan. 17, 2006); *Abdul-Alazim v. Superintendent, Mass. Corr. Inst.,* 56 Mass. App. Ct. 449, 454 n.8, 778 N.E.2d 946, 950 n.8 (2002).

Many religious organizations have condemned *Smith*. *See, e.g., First Covenant Church v. City of Seattle,* 120 Wn.2d 203, 840 P.2d 174 (1992) (Amici curiae supporting the church included Christian Legal Society; Church Council of Greater Seattle; The Corporation of the Catholic Archbishop of Seattle; Washington State Catholic Conference; Diocese of Olympia of The Episcopal Church in Western Washington; North Pacific Conference of Covenant Churches; Evangelical Covenant Church; General Assembly of the Presbyterian Church (U.S.A.); Baptist Joint Committee on Public Affairs; Evangelical Lutheran Church in America; General Conference of Seventh-Day Adventists; Council on Religious Freedom; Americans United for Separation of Church and State; National Association of Evangelicals; and National Council of the Churches of Christ in the U.S.A.); Brief Amicus Curiae Of

Americans United For Separation Of Church And State, *et al.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, No. 91-948 at 28-30, 38, 1991 U.S. Briefs 948 (May 26, 1992) (Amici curiae including the Presbyterian Church, the Anti-Defamation League of B'nai B'rith, the Baptist Joint Committee on Public Affairs, the Catholic League for Religious and Civil Rights, the Christian Legal Society, the Church of Jesus Christ of Latter-Day Saints, the Evangelical Lutheran Church, the Seventh-Day Adventists, and the National Association of Evangelicals, among others, asked the Court to "reconsider" and "correct" the teaching of *Smith* and informed the Court that "religious and civil liberties communities, across the spectrum of theological and political opinion, are united in the conviction that *Smith* was wrongly decided.").

Legal scholars have joined the chorus of criticism of *Smith*. *See, e.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception,"* 108 Penn. St. L. Rev. 573, 573 n.2, 581-87 (2003) ("Smith has the rather unusual distinction of being one case that is almost universally despised . . . by both liberals and conservatives"); Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J. L. & Politics 119, 120-21, 123, 143, 187 (2002) ("[T]here is no effective way to mitigate the formal neutrality standard adopted in *Smith*. If formal neutrality is fundamentally inconsistent with a constitutional regime that protects religious liberty and equality, the problem can be solved only by overruling *Smith*."); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 Ind. L.J. 1, 12 (2000) ("*Smith* essentially reduced the Free Exercise Clause to a prohibition on deliberate governmental discrimination against religion . . . ");

James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91, 113-16 (1991) (*Smith* "excised" the free exercise clause from the Bill of Rights); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1111 (1990); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 231-34 (1991) ("Smith appears to leave the Free Exercise Clause without independent constitutional content and thus, for practical purposes, largely meaningless.").

In sum, *Smith* is ripe for reconsideration under each of the criteria cited above in the Stern, Gressman treatise.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 2, 2006

APPENDICES

131 Cal.App.4th 417, 32 Cal.Rptr.3d 209

Court of Appeal, Second District, Division 3, California.

The ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, Petitioner,

v.

SUPERIOR COURT of Los Angeles County, Respondent; The People, Real Party in Interest.

Does 1 and 2, Petitioners,

v.

Superior Court of Los Angeles County, Respondent; The People, Real Party in Interest.

Nos. B177852, B180696.

July 25, 2005.

As Modified on Denial of Rehearing Aug. 16, 2005.

Review Denied Nov. 16, 2005.

Hennigan, Bennett & Dorman, J. Michael Hennigan, Donald F. Woods, Jr., and Jeffrey S. Koenig, Los Angeles, for Petitioner The Roman Catholic Archbishop of Los Angeles.

Law Offices of Guzin & Steier and Donald H. Steier, Los Angeles, for Petitioners Doe 1 and Doe 2.

O'Melveny & Myers and Charles C. Lifland, Los Angeles, for Monsignor Thomas J. Green as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Steve Cooley, District Attorney (Los Angeles), and Lael Rubin, William Hodgman, Brentford J. Ferreira and Patrick D. Moran, Deputy District Attorneys, for Real Party in Interest.

KLEIN, P.J.

INTRODUCTION

This proceeding arises out of a grand jury investigation into allegations that two Roman Catholic priests, petitioners Doe 1 and Doe 2 (sometimes hereafter referred to as the Priests), sexually assaulted children while they worked for petitioner Roman Catholic Archbishop of Los Angeles, a Corporation Sole (hereafter referred to as the Archdiocese). In seeking to quash grand jury subpoenas duces tecum, petitioners raise issues that require a balance of the rights of religious belief and practice with the rules of the criminal justice system.

As the California Supreme Court noted in connection with this state's evidentiary privilege for clergy-penitent communications (Evid.Code, §§ 1030-1034), "the statutory privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry." (*In re Lifschutz* (1970) 2 Cal.3d 415, 428, 85 Cal.Rptr. 829, 467 P.2d 557.) While it is true the right to religious freedom holds a special place in our history and culture, there also must be an accommodation by religious believers and institutions to the rules of civil society, particularly when the state's compelling interest in protecting children is in question. Although the religion clauses of the First Amendment to the United States Constitution "embrace[] two concepts, – freedom to believe and freedom to act," the first concept "is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304, 60 S.Ct. 900, 84 L.Ed. 1213, fn. omitted.)

The Los Angeles County Grand Jury subpoenaed various documents from the Archdiocese which purportedly would allow the grand jury to determine whether to indict the Priests. Petitioners objected to disclosure of the subpoenaed documents, primarily relying on the freedom of religion clauses in the federal and California Constitutions and on California's evidentiary privileges. Some of petitioners' objections were sustained, but the great majority of them were overruled. Petitioners seek to reverse the adverse rulings. With the exception of a single document, we affirm the rulings ordering the subpoenaed materials to be turned over to the grand jury.

PROCEDURAL BACKGROUND

In June and July 2002, the Los Angeles County Grand Jury served subpoenas duces tecum on the Archdiocese's custodian of records, seeking documents relating to child sexual abuse allegedly committed by certain Roman Catholic priests. Except for routine attorney-client communications, the Archdiocese turned over the requested documents. However, several priests and the Archdiocese immediately filed motions to quash the subpoenas. As a result, none of the documents has been turned over to the grand jury.

The parties to this proceeding, the petitioners, the Priests and the Archdiocese, and the real party in interest, the District Attorney of Los Angeles County, stipulated to the appointment of Retired Judge Thomas Nuss as referee (hereinafter, referee) to resolve substantive issues raised by the motions to quash.

On July 15, 2002, the referee concluded the subpoenas were not defective for failing to meet the affidavit requirements set forth in Code of Civil Procedure sections

1985, subdivision (b) (affidavit shall be served with subpoena duces tecum showing good cause and materiality) and 1987.5 (service of subpoena duces tecum is invalid without affidavit).

On July 29, 2002, petitioners sought a writ of mandate from this court vacating the referee's order denying their motions to quash. We issued an order to show cause. After briefing and oral argument, we held a California grand jury has the power to issue a subpoena duces tecum and that such a subpoena does not require a good cause affidavit. (*M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 127 Cal.Rptr.2d 454.)[1]

On June 25, 2004, the referee quashed all the grand jury subpoenas in response to the United States Supreme Court's decision in *Stogner v. California* (2003) 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, which held California's newly enacted statute of limitations for child molestation was unconstitutional when used to *revive* time-barred prosecutions. However, the referee granted the People leave to serve new subpoenas requesting the identical documents on the assurance and subsequent showing the People were investigating credible, prosecutable claims against named targets.

On June 30, 2004, the People served the two grand jury subpoenas, one for Doe 1 and one for Doe 2, at issue in this writ proceeding.

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[1] We also decided a second writ petition in this matter. (See *Los Angeles Times v. Superior Court* (2003) 114 Cal.App.4th 247, 7 Cal.Rptr.3d 524.)

On July 9, 2004, Does 1 and 2 moved to quash the new subpoenas. The Archdiocese followed with its own motion to quash.

On September 7, 2004, the referee issued a decision which substantially rejected petitioners' motions to quash. Out of the approximately 285 subpoenaed documents challenged by petitioners below, the referee sustained 53 objections and ordered the remaining documents turned over to the grand jury. Of the 53 sustained objections, one was based on the attorney-client privilege (Evid.Code, § 954), two were based on the clergy-penitent privilege (Evid.Code, §§ 1033-1034), and 50 were based on the physician-patient privilege (Evid.Code, § 1014). The referee stayed disclosure of the documents to enable the parties to seek review.

Thereafter, the Archdiocese filed a petition for writ of mandate in this court seeking to prevent disclosure of 15 documents the referee had ruled could go to the grand jury. The Priests filed their own petition for writ of mandate asking this court to prevent the disclosure of *any* documents to the grand jury. The petitions were consolidated, an order to show cause was issued, production of documents was stayed, and briefing was obtained from the parties.

An amicus curiae brief from Monsignor Thomas Green, a professor of canon law, was filed in support of petitioners' claims.

FACTUAL BACKGROUND

1. *Petitioners' claim the subpoenaed documents cannot be disclosed to grand jury.*

Petitioners contend the referee erred in ruling the subpoenaed documents should be disclosed to the grand jury because compliance with the subpoenas would violate constitutional and statutory rules. Petitioners assert a Catholic bishop has a religious obligation to care for the physical, emotional and spiritual well-being of the priests within his diocese. Petitioners argue all the communications arising out of this obligation, including communications with the accused priests and the psychotherapists who treat them, are protected from disclosure by the constitutional right to freedom of religion and by California's psychotherapist-patient and clergy-penitent evidentiary privileges. In support of these claims, petitioners submitted evidentiary declarations, which were opposed by declarations filed by the District Attorney.

2. *Petitioners' evidentiary declarations; their reliance on the church's "formation of clergy" doctrine.*

In declarations supporting its motion to quash, the Archdiocese asserted that according to Roman Catholic doctrine, bishops are the direct successors of the 12 apostles of Jesus Christ.[2] Under the church's *formation of clergy* doctrine, a bishop is charged with the responsibility of sanctifying his priests, and is obligated to "care for and treat any emotional, physical, or spiritual problem a priest

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[2] We express no opinion regarding the validity of any interpretation of religious doctrine contained in these declarations.

may be experiencing."[3] In carrying out this obligation, a bishop "may establish detailed boundaries for his priests concerning chastity" and "pass judgment in particular cases concerning the observance of this obligation. The bishop is obliged to intervene and judge inappropriate conduct of any priest and to impose restrictions and penalties as appropriate in his moral judgment." The Archdiocese argued these tasks require "open communications between the bishop and his priests."

A bishop "is permitted to appoint Episcopal vicars. An Episcopal vicar has the same power as a Bishop in the specific type of activity for which he is appointed." The Archbishop in Los Angeles, Cardinal Mahony, has appointed such a vicar, called the Vicar for Clergy, who is obligated to care for the "emotional, physical, psychological and spiritual lives" of the archdiocesan priests. Monsignor Craig Cox, who is both a canon lawyer and the Vicar for Clergy, declared Cardinal Mahony had established policies for the Archdiocese under which accusations of clerical sexual misconduct immediately are investigated. "The involved priest is confronted and is encouraged to discuss whatever problems he is experiencing regarding chastity." "Msgr. Cox states 'Based on the fundamental religious relationship between the bishop and his priest, the priest

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[3] This citation comes from the referee's final decision in this matter. Although this, and similar factual statements, originated in declarations filed by the parties in this court, most of those declarations have been filed under seal. Therefore, this opinion will refer to the facts alleged below either by citing the referee's decision, which is not under seal, or by referring generically and circumspectly to documents presently filed under seal. (See *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 105, 4 Cal.Rptr.3d 823; *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 308, 116 Cal.Rptr.2d 833.)

is encouraged to communicate his deepest psychological and sexual issue[s], to undergo psychiatric evaluation and treatment, and to share the results of this therapy with the Vicar and the Bishop. *All of this for the purpose of the ongoing formation and sanctification of the priest.'*" (Italics added.)

If "a canonical investigation of a boundary violation or accusation of sexual misconduct [is required], the process is conducted in accord with the requirements of Canons 1717-1719"[4] and pursuant to Archdiocesan practice. These Canons require the bishop to inquire carefully either personally or through some acceptable person, about the facts and circumstances and about the imputability of the offense. [¶] . . . [T]o date, the bishops and priests have always understood that these records would be confidential, and files covering these materials would be kept separately from the priest's normal personnel file."

3. *The District Attorney's evidentiary declarations.*

In an attempt to rebut petitioners' evidentiary claims, the District Attorney submitted declarations from Thomas Doyle, a Roman Catholic priest who is also an expert in canon law.

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[4] Canon 1717, § 1, provides, in part: "'Whenever an ordinary has knowledge, which at least seems true of a delict, he is carefully to inquire personally about the fact. . . .'" "Canon 1719 states in part: '[T]he acts of the investigation, the decrees of the ordinary *which initiated and concluded the investigation*, and everything which preceded the investigation are to be kept in the secret archive of the curia if they are not necessary for the penal process."

Fr. Doyle stated it is expected the preliminary investigation, required by Canons 1717-1719, will generate a written record. "The information contained in the record may be sensitive and is to be treated accordingly with due regard for the reputations of those involved. It may however, be licitly and properly disclosed to civil law enforcement agencies if it involves [a] matter as serious as sexual abuse." Fr. Doyle asserted "investigations of child abuse documented by the Archdiocese, through the Vicar for Clergy, which are kept in the 'secret archives' (confidential files) can be and have been supplied to law enforcement in other jurisdictions."

4. *Referee's final decision on petitioners' claims.*

In his final decision, the referee rejected petitioners' claims all the subpoenaed documents had arisen out of the Archbishop's religious obligation to care for the physical, emotional and spiritual well-being of his priests, and, therefore, that disclosing them to the grand jury would violate a constitutional right to freedom of religion, California's evidentiary privileges for clergy-penitent and psychotherapist-patient communications, and various other rules of law.

The referee held the subpoenas violated neither the free exercise clause nor the establishment clause of the federal Constitution. Further, compliance with the subpoenas would not impermissibly burden petitioners' religious beliefs or practice under *Employment Div., Ore, Dept. of Human Res. v. Smith* (1990) 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (*Smith*), nor would it create an impermissible governmental entanglement with internal church affairs under *Lemon v. Kurtzman* (1971) 403

U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745. As for California's free exercise clause, even under the pre-*Smith* (*Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876), compelling state interest test, disclosure was required because the government has a compelling interest in prosecuting child molesters.

While the referee found evidence in the record to support the assertion Cardinal Mahony had a religious obligation to care for his priests, he also found the Archdiocese simultaneously had been engaged in the kind of routine investigation any employer would undertake upon learning a trusted employee had been accused of child molestation. In addition, the referee held the clergy-penitent privilege was inapplicable where the communication had been disclosed to a third person.

Regarding the principal remaining issues, the referee concluded the psychotherapist-patient privilege protected some of the subpoenaed documents, that the prosecution of Doe 1 and Doe 2 was not precluded by the United States Supreme Court's statute of limitations ruling in *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, that the prosecutor had not improperly manipulated the grand jury process, and that the subpoenas were not impermissibly vague or overbroad.

CONTENTIONS

Petitioners' chief contentions are that disclosure of the subpoenaed documents is barred by the First Amendment of the federal Constitution and by the free exercise clause of the California Constitution, as well as by Evidence Code provisions relating to the clergy-penitent and psychotherapist-patient privileges.

Additionally, petitioners contend disclosure of the subpoenaed documents is barred by California's attorney-client and work product privileges; under *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, disclosure of the subpoenaed documents is barred by the ex post facto clause; the District Attorney improperly usurped the grand jury's authority; the subpoenas duces tecum were impermissibly vague and were issued without proper authority and without the requisite good faith affidavit; and disclosure of the subpoenaed documents is barred by assorted statutory and constitutional rules.

DISCUSSION

1. *Constitutional right to freedom of religion does not bar disclosure of the subpoenaed documents.*

Petitioners contend the disputed documents[5] cannot be turned over to the grand jury without violating their right to freedom of religion. In particular, they claim disclosure of the subpoenaed documents will violate the free exercise and establishment clauses of the First Amendment to the federal Constitution, as well as the free exercise clause of the California Constitution. For the reasons explained below, petitioners' contention is without merit.

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[5] While the Archdiocese is challenging only the disclosure of 15 documents, the Priests are disputing every single document the referee ordered turned over to the grand jury.

a. *General principles.*

"The Religion Clauses of the First Amendment provide: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." (*Cutter v. Wilkinson* (2005) ___ U.S. ___, 125 S.Ct. 2113, 2120, 161 L.Ed.2d 1020.) The First Amendment "safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut, supra,* 310 U.S. 296, 303-304, 60 S.Ct. 900, 84 L.Ed. 1213, fn. omitted.)

Judicial decisions regarding the religion clauses of the First Amendment are subject to de novo review. (See *Rubin v. City of Burbank* (2002) 101 Cal.App.4th 1194, 1199, 124 Cal.Rptr.2d 867 [establishment clause challenge to religious invocation at municipal function reviewed de novo].)

b. *No violation of the free exercise clause of the federal Constitution.*

Petitioners' contention disclosure of the subpoenaed documents would violate the free exercise clause of the federal Constitution is defeated by *Smith.*

(1) *Smith's new rule for evaluating free exercise claims rests on "neutral laws of general applicability."*

In *Smith, supra,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, a case involving peyote use by members of the Native American Church in a state (Oregon) which had not granted an exemption for sacramental use of the drug, the United States Supreme Court adopted a new rule for evaluating free exercise claims. *Smith* rejected the former balancing test (see *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965), under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest," reasoning "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." (*Smith, supra,* 494 U.S. at pp. 878-879, 883, 110 S.Ct. 1595.) Under the new rule, "the right of free exercise does not relieve an individual of the obligation to comply with a '*valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).*' [Citation.]" (*Id.* at p. 879, 110 S.Ct. 1595, italics added.)

In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472, the United States Supreme Court summed up its newly-announced rule "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that *a law that is neutral and of general applicability need not be justified by a compelling*

governmental interest even if the law has the incidental effect of burdening a particular religious practice. . . . A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." (*Id.* at pp. 531-532, 113 S.Ct. 2217, italics added.)

Although *Smith* involved criminal conduct, the case is not limited to such situations. As *Smith* commented, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, *like its ability to carry out other aspects of public policy,* 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' [Citation.] To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' – permitting him, by virtue of his beliefs, 'to become a law unto himself,' [citation] – contradicts both constitutional tradition and common sense." (*Smith, supra,* 494 U.S. at p. 885, 110 S.Ct. 1595, fn. omitted, italics added; see *Gary S. v. Manchester School Dist.* (1st Cir.2004) 374 F.3d 15, 18 [rejecting argument *Smith* was "limited to instances of socially harmful or criminal conduct," court applied *Smith* to claim the Individuals with Disabilities Education Act was unconstitutional as applied to disabled child attending Catholic elementary school].)

Smith is applicable here and defeats petitioners' contention the First Amendment's free exercise clause bars disclosure of the subpoenaed documents.

(2) *The "ecclesiastical abstention" doctrine does not apply.*

Petitioners, however, argue an exception to the *Smith* rule applies, namely, the ecclesiastical abstention doctrine. This doctrine grew out of the so-called "church property cases." However, the church property cases, as exemplified by the ones cited by the Archdiocese, are inapposite because they involve internal church disputes whose resolution crucially depend on interpretations of religious doctrine.[6]

However, the case at bar is not, at its core, an *internal* church dispute. It is a criminal investigation into suspected child molestation allegedly committed by Catholic priests. *Smith* itself characterized the church property decisions as cases in which the government was impermissibly "lend[ing] its power to one or the other side in controversies over religious authority or dogma." (*Smith, supra,* 494 U.S. at p. 877, 110 S.Ct. 1595.) The case at bar does not involve an internal church dispute over religious authority or dogma.

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[6] The Archdiocese relied on the following church property cases. *Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 20 L.Ed. 666, 1871 WL 14848, arose out of a schism in the Presbyterian Church during the Civil War about the morality of slavery, which led to legal disputes between rival congregations over entitlement to church property. *Watson* deferred to a ruling by the church's national governing body. In *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120, where the right to use church property depended on the validity of a religious official's ecclesiastical appointment, the court deferred to the church's own ruling. *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151, reversed a decision, reinstating a defrocked bishop, predicated on the lower court's theory the church's internal disciplinary process had been defective.

(3) *The "ministerial exception" doctrine does not apply.*

Petitioners also argue the *Smith* rule does not defeat their free exercise claim because the so-called "ministerial exception" doctrine applies. Petitioners' reliance on this exception is misplaced.

The ministerial exception doctrine is based on the notion a church's appointment of its clergy, along with such closely related issues as clerical salaries, assignments, working conditions and termination of employment, is an inherently religious function because clergy are such an integral part of a church's functioning as a religious institution. (See, e.g., *Werft v. Desert Southwest Annual Conference* (9th Cir.2004) 377 F.3d 1099, 1101.) This is not an employment case and the ministerial exception doctrine has no application here.

(4) *Smith applies to these grand jury subpoenas.*

The Archdiocese contends *Smith* is inapplicable because there is no legislative act at issue, and because subpoenas are not neutral laws of general application. This argument misconstrues the notion of generally applicable neutral laws. "A law is not neutral towards religion if its 'object . . . is to infringe upon or restrict practices because of their religious motivation. . . . ' [Citation.] A law is not generally applicable if it 'in a selective manner impose[s] burdens only on conduct motivated by religious belief. . . . '" (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 550, 10 Cal.Rptr.3d 283, 85 P.3d 67.) The neutral law of general

applicability at issue here is the statutory and common law[7] basis of California's grand jury process. That this particular grand jury investigation and the subpoenas it generated are directed at a Catholic archdiocese is merely an incidental effect of the grand jury process.

In *Matter of Grand Jury Subpoena (Chinske)* (D.Mont.1991) 785 F.Supp. 130, the petitioner claimed that having to comply with a grand jury subpoena would violate his religious beliefs. At oral argument, the petitioner's attorney "attempted to distinguish *Smith* . . . by claiming that the compulsion to testify before the grand jury is not a law of general application prohibiting certain conduct." (*Id.* at p. 133.) Commenting that "[c]ounsel clearly does not appreciate the scope of the Supreme Court's recent rulings concerning free exercise claims," the federal court held "*Smith* clearly does not apply only to cases where the law in question prohibits certain conduct, since the court considered tax collection cases in reaching its decision. [Citation.] The laws of this land compel all persons to pay taxes assessed by various governmental bodies, regardless of their religious convictions, . . . In much the same way, the laws of this land compel all persons to testify before the grand jury when subpoenaed to do so. . . . " (*Id.* at pp. 133-134.) Assuming for the purpose of decision that the petitioner's religious beliefs were sincere, the court held the free exercise claim was defeated by *Smith* because any burden on petitioner's religious

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[7] As this court pointed out in *M.B. v. Superior Court, supra,* 103 Cal.App.4th at pp. 1388-1389, 127 Cal.Rptr.2d 454 "our Supreme Court has emphatically 'rejected the contention that the California grand jury [is] a "purely" statutory body, wholly distinct from its common law predecessor.' (*People v. Superior Court (1973 Grand Jury)* (1975) 13 Cal.3d 430, 440, fn. 11, 119 Cal.Rptr. 193, 531 P.2d 761. . . .)"

beliefs was not the object of the grand jury subpoena, but "'merely the incidental effect of a generally applicable and otherwise valid' governmental action." (*Id.* at p. 134.)

We similarly conclude the grand jury subpoenas here do not violate the free exercise clause of the federal Constitution because they are based on a valid and neutral law of general applicability that will have, at most, an incidental effect on the Archdiocese's practice of keeping confidential the communications arising out of the Archbishop's formation of clergy obligation of caring for his priests.

c. *No violation of the establishment clause of the federal Constitution.*

Petitioners contend disclosure of the subpoenaed documents is barred by the establishment clause of the federal Constitution. This claim is without merit because the primary effect of enforcing the subpoenas will not require the government either to interfere with the internal workings of the Archdiocese, or to choose between competing religious doctrines.

"The Establishment Clause provides that 'Congress shall make no law respecting an establishment of religion. . . . ' [Citation.] In *Lemon v. Kurtzman,* 403 U.S. 602[, 91 S.Ct. 2105, 29 L.Ed.2d 745] . . . (1971), the Supreme Court established a three-part test for determining whether a statute violates the Establishment Clause: [¶] First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion. [Citation.]" (*E.E.O.C. v. Catholic University*

of America (D.C.Cir.1996) 83 F.3d 455, 465.) "Although it is difficult to attach a precise meaning to the word 'entanglement,' courts have found an unconstitutional entanglement with religion in situations where a 'protracted legal process pit[s] church and state as adversaries,' [citation], and where the Government is placed in a position of choosing among 'competing religious visions.' [Citation.]" (*Ibid.*) "Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, [citation], and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." (*Agostini v. Felton* (1997) 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391.)

The Archdiocese asserts that, under *Lemon*, "[t]he constitutional question can be simply put: Does the state action (here it is a subpoena) interfere with a religious practice?" The Archdiocese answers this question as follows "The effect of these subpoenas is to interfere with the bishop's pastoral and episcopal relationship with his priests in need, to destroy any serious pastoral discussion of deeply personal and intimate concerns of the priests regarding their celibacy, sexuality and emotional and psychological needs, and to 'foster an "excessive government entanglement with religion."' [Citation.] More specifically, these subpoenas interfere directly with ecclesiastical policy by mandating the disclosure of information that, under Roman Catholic practice, is held in strict confidence."

The Archdiocese asserts the closest Supreme Court decision to the case at bar is *NLRB v. Catholic Bishop of Chicago* (1979) 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533, which held the Board's exercise of jurisdiction over

lay teachers at Catholic high schools presented a significant First Amendment risk. However, the core issue in that case was whether there had been unfair labor practices, and it was this issue which was necessarily entangled with questions of religious doctrine.[8]

However, the core issue in the case at bar is whether children were molested by priests who worked for the Archdiocese, an issue having no comparable religious doctrine aspect.

Also pertinent here is *Society of Jesus of New England v. Com.* (2004) 441 Mass. 662, 808 N.E.2d 272, in which the Massachusetts Supreme Judicial Court rejected a claim that disclosure of a priest's personnel file, in connection with a criminal prosecution for sexual assault, would violate the establishment clause. The court explained "With regard to the test of 'effect' on religion, we must look at the law's 'principal or primary effect,' *Lemon v. Kurtzman, supra,* not at its incidental effects. Here, the alleged inhibition on religion is not a 'principal or primary' effect of the subpoena, although it may, in a subtle way, provide some disincentive that would arguably discourage accused priests from being totally forthcoming with their superiors. . . . [¶] *Nor does the enforcement of this subpoena result in any excessive government entanglement with religion.* The court can decide issues of relevance, burdensomeness, and

[8] The case involved "charges of unfair labor practices filed against religious schools," to which "the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the [NLRB], in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." (*NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. at p. 502, 99 S.Ct. 1313.)

the applicability of the asserted privileges without having to decide matters of religion or embroil itself in the internal workings of the Jesuits. Indeed, the only form of 'entanglement' with religion at issue in the motions to quash is a form that [the priest] and the Jesuits have themselves invited, namely, the court's consideration whether [the priest's] communications qualify for protection under the priest-penitent privilege. . . . Assessment of the applicability of that privilege does not lead to excessive government entanglement in religion." (*Id.* at p. 283, fn. omitted, italics added.)

This case is analogous to *Society of Jesus of New England v. Com., supra,* 441 Mass. 662, 808 N.E.2d 272, rather than to *NLRB v. Catholic Bishop of Chicago, supra,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533. We conclude disclosure of the subpoenaed documents to the grand jury will not result in excessive entanglement or any other violation of the establishment clause.

d. *"Hybrid rights" exception to Smith not applicable.*

Petitioners contend disclosure of the subpoenaed documents would violate the First Amendment because the so-called "hybrid rights" exception to the *Smith* rule applies in this case. The Archdiocese argues "the neutrality rule of *Smith* does not apply" here because "the challenged state conduct interferes with the free exercise of religion *and* causes excessive entanglement." This claim is without merit.

As a doctrinal matter, the nature and scope of the so-called hybrid exception to *Smith* is rather nebulous. "The *Smith* court developed the hybrid claim exception in an effort to explain several past decisions which invalidated

on free exercise grounds laws that appeared to be neutral and generally applicable. [Citation.]" (*Gary S. v. Manchester School Dist.* (D.N.H.2003) 241 F.Supp.2d 111, 121, fn. omitted, affd. (1st Cir.2004) 374 F.3d 15, 19.) "The most relevant of the so-called hybrid cases is *Wisconsin v. Yoder,* 406 U.S. 205, 232-33 . . . [92 S.Ct. 1526, 32 L.Ed.2d 15] (1972), in which the Court invalidated a compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to school." (*Brown v. Hot, Sexy and Safer Productions, Inc.* (1st Cir.1995) 68 F.3d 525, 539.) Under the hybrid rights theory, " 'the First Amendment [still] bars application of a neutral, generally applicable law to religiously motivated action' if the law implicates not only 'the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press[.]' [Citation.] In such 'hybrid' cases, the law or action must survive strict scrutiny." (*San Jose Christian College v. Morgan Hill* (9th Cir.2004) 360 F.3d 1024, 1031.)

However, even assuming a hybrid rights exception to *Smith,* it would not apply to this case because the Archdiocese merely has combined a free exercise claim with a meritless establishment clause claim. (See *Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at p. 559, 10 Cal.Rptr.3d 283, 85 P.3d 67, fn. 15 ["Catholic Charities perfunctorily asserts that its claims under the establishment clause [citation] also justify treating this case as involving hybrid rights. We have, however, already determined that those claims lack merit."].) Hence, *Smith's* "valid and neutral rule of law of general applicability" standard does apply to petitioners' federal free exercise claim.

e. *California free exercise claim is meritless.*

Petitioners contend the *Smith* rule does not apply to a free exercise claim under the California Constitution and that we should apply, instead, the pre-*Smith* compelling state interest test. However, we conclude that even pursuant to the former strict scrutiny test, under which governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest, disclosure of the subpoenaed documents would not violate petitioners' rights. Therefore, we need not decide whether *Smith* applies to California's free exercise clause.

California's free exercise clause (Cal. Const., art. I, § 4.) provides "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State."

The *Smith* case was decided in 1990. In 2004, the California Supreme Court was faced in *Catholic Charities of Sacramento, Inc.v. Superior Court, supra,* 32 Cal.4th 527, 10 Cal.Rptr.3d 283, 85 P.3d 67 with a claim that the pre-*Smith* test applies to California's free exercise clause because its language differs from the federal free exercise clause.[9] "Catholic Charities' final argument for applying strict scrutiny invokes the free exercise clause of the California Constitution. [Citation.] That clause, Catholic Charities contends, forbids the state to burden the practice

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[9] Whereas the federal clause prevents Congress from passing any law prohibiting the free exercise of religion, California's free exercise clause guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference. . . ."

of religion, even incidentally, through a neutral, generally applicable law, unless the law in question serves a compelling governmental interest and is narrowly tailored to achieve that interest. Catholic Charities asserts, in other words, that we must interpret the California Constitution the same way the United States Supreme Court interpreted the federal Constitution's free exercise clause in *Sherbert, supra,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965." (*Id.* at p. 559, 10 Cal.Rptr.3d 283, 85 P.3d 67, fn. omitted.)

Saying that in the proper case it would not have hesitated "to declare the scope and proper interpretation of the California Constitution's free exercise clause," *Catholic Charities* concluded it did not need to do so because the pre-*Smith* strict scrutiny test[10] had been met. *Catholic Charities* involved the claim by a religiously-connected nonprofit public benefit corporation that it had been impermissibly burdened by the Women's Contraception Equity Act (WCEA), a law requiring certain health and disability contracts to cover prescription contraceptives. The Supreme Court held "Assuming for the sake of argument the WCEA substantially burdens a religious belief or practice, the law nevertheless serves a compelling state interest and is narrowly tailored to achieve that interest. [¶] The WCEA serves the compelling state interest of eliminating gender discrimination." (*Catholic Charities of*

[10] "Under [the strict scrutiny] standard, a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented the least restrictive means of achieving a compelling interest or, in other words, was narrowly tailored." (*Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at p. 562, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

Sacramento, Inc. v. Superior Court, supra, 32 Cal.4th at pp. 563-564, 10 Cal.Rptr.3d 283, 85 P.3d 67.)

We reach a similar conclusion here. As the following case law demonstrates, the grand jury's investigation into suspected child molestation serves a compelling state interest and is narrowly tailored to achieve that interest.

In *Branzburg v. Hayes* (1972) 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, in the course of holding that reporters may be required to testify before grand juries about the criminal conduct of their confidential sources, the United States Supreme Court said "Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle [is] that '*the public . . . has a right to every man's evidence,*' except for those persons protected by a constitutional, common-law, or statutory privilege. . . . " (*Id.* at p. 688, 92 S.Ct. 2646, italics added.) "The requirements of those cases, [citation], which hold that a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights, are also met here. As we have indicated, *the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen,* and it appears to us that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' [Citation.]" (*Id.* at p. 700, 92 S.Ct. 2646, italics added.)

With a nod to *Branzburg,* many federal cases since have held that compelled testimony before a grand jury in violation of a witness's religion does not constitute a free

exercise violation. We rely on federal cases in this context because (1) before *Smith* was decided, both the federal and the California free exercise clauses were analyzed under the compelling state interest test (see *Walker v. Superior Court* (1988) 47 Cal.3d 112, 138-141, 253 Cal.Rptr. 1, 763 P.2d 852), and (2) we have found no California cases involving free exercise clause claims in a grand jury context.

These federal cases have assumed, for the purpose of decision, that the witness's objection to testifying was both sincerely held and religiously grounded. Each case concluded the ensuing burden on the witness's religious belief was outweighed by the compelling state interest in obtaining grand jury testimony. (See *In re Grand Jury Empaneling of Special Grand Jury* (3d Cir.1999) 171 F.3d 826, 832 [even if Orthodox Jewish law proscribed giving grand jury testimony against family member, "the government's interest in securing the evidence" in white collar crime case was "compelling" because "the duty to prosecute persons who commit serious crimes is part and parcel of the government's 'paramount responsibility for the general safety and welfare of all its citizens' "]; *Grand Jury Proceedings of John Doe v. U.S.* (10th Cir.1988) 842 F.2d 244, 247-248 [Mormon belief proscribing intra-family testimony before grand jury was outweighed by compelling state interest in investigating violation of federal criminal law]; *In re Three Children* (D.N.J.1998) 24 F.Supp.2d 389, 392 ["the government's interest in investigating and successfully prosecuting crimes, which invariably includes taking the grand jury testimony of witnesses, far outweighs the incidental burden on the professed free exercise of religion in this matter."]; see also *Congregation B'Nai Jonah v. Kuriansky* (1991) 576 N.Y.S.2d 934, 936 [172 A.D.2d 35,

39] [state's interest in enforcing subpoenas for Medicaid fraud investigation outweighed infringement on free exercise "Unquestionably, the State has a profound interest in fighting corruption in the Medicaid industry and in enforcing its tax laws [citations]."].)

The Priests also argue that because the "documents pertain to confidential communications of a most private nature between a Roman Catholic bishop and the priests he ordained," their disclosure "will chill the free exercise of their religion, and inevitably and impermissibly alter the relationship [between] Catholic bishops and priests and the way they practice their religion."

However, several jurisdictions have rejected similar arguments and we agree with their reasoning. (See *People v. Campobello* (2004) 348 Ill.App.3d 619, 284 Ill.Dec. 654 658-59, 810 N.E.2d 307, 311-312 [Catholic diocese must comply with government subpoena in sexual assault prosecution against priest, even if Canon 489 requires bishop to maintain secret archive for files relating to internal Church discipline]; *Com. of Penn. v. Stewart* (1997) 547 Pa. 277 [690 A.2d 195, 201-202] [criminal defendant's compelling interest in fair trial outweighed Catholic diocese's claim to withhold documents deemed confidential under canon law because "the burden on the Diocese's religious freedom furthers a compelling governmental interest by the least restrictive means available"]; *Society of Jesus of New England v. Com., supra,* 441 Mass. 662, 808 N.E.2d 272, 279 [state could subpoena personnel file of priest charged with sexual assault even if such disclosure would inhibit " communications that are necessary to maintain the Jesuits' relationship with one of its own priests"].)

Hence, we conclude that even if the pre-*Smith* compelling state interest test governs a California free exercise claim, that test is met here.

f. *Conclusions regarding federal and state constitutional contentions.*

We are not persuaded by any of petitioners' freedom of religion arguments. We conclude disclosure of the subpoenaed documents is not barred by the First Amendment to the federal Constitution, or by the free exercise clause of California's Constitution. Having so determined, we next examine the two principal statutory grounds petitioners rely on to prevent disclosure of the subpoenaed documents to the grand jury, the clergy-penitent privilege and the psychotherapist-patient privilege.

2. *Documents in question do not satisfy criteria for application of clergy-penitent privilege, irrespective of the formation of clergy theory.*

Evidence Code section 1032, within the article relating to the clergy-penitent privilege, defines a "penitential communication" as "a communication made in confidence, *in the presence of no third person* so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or

organization, *has a duty to keep those communications secret.*" (Italics added.)[11]

Petitioners argue the subpoenaed documents constitute privileged penitential communications within the meaning of Evidence Code section 1032 because they were generated in the course of the formation of clergy process during the Archdiocese's interventions to help troubled priests.

Petitioners' contention fails. The penitential communications are not privileged because they were not "made in confidence, in the presence of no third person so far as the penitent is aware," to a cleric who is obligated "to keep those communications secret." (Evid.Code, § 1032.)

a. *Statutory scheme is controlling.*

"Evidence Code section 911 provides, in relevant part: 'Except as otherwise provided by statute: [¶] . . . [¶] (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.' This section declares the California Legislature's determination that 'evidentiary privileges shall be available *only*

[11] The other clergy-penitent privilege statutes provide that: "a 'member of the clergy' means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization" (Evid.Code, § 1030); " 'penitent' means a person who has made a penitential communication to a member of the clergy" (Evid.Code, § 1031); "[s]ubject to [Evidence Code] Section 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege" (Evid.Code, § 1033); and, "[s]ubject to [Evidence Code] Section 912, a member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege" (Evid.Code, § 1034).

as defined by statute. [Citation.] Courts may not add to the statutory privileges except as required by state or federal constitutional law [citations], nor may courts imply unwritten exceptions to existing statutory privileges. [Citations.]' (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373, 20 Cal.Rptr.2d 330, 853 P.2d 496 . . . see *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656, 125 Cal.Rptr. 553, 542 P.2d 977) . . . [privileges contained in Evidence Code are exclusive and courts are not free to create new privileges as matter of judicial policy unless constitutionally compelled]. . . . " (*American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 887, 8 Cal.Rptr.3d 146, italics added.)

"In section 911 of the Evidence Code, the Legislature clearly intended to abolish common law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy. [Citations.] Thus, unless a privilege is expressly or impliedly based on statute, its existence may be found only if required by constitutional principles, state or federal." (*Welfare Rights Organization v. Crisan* (1983) 33 Cal.3d 766, 769, 190 Cal.Rptr. 919, 661 P.2d 1073.)

b. *Parties' respective burdens of proof.*

Ordinarily, "[t]he party claiming [an evidentiary] privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute." (*D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729, 36 Cal.Rptr. 468, 388 P.2d 700; see, e.g., *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 370, 122 Cal.Rptr.2d 504 [per *Chadbourne,* DMV bore burden of establishing claim of privilege

based on Evid.Code, § 1040 (public entity has privilege to resist disclosure of official information)].)

Here, however, it was ultimately the District Attorney's burden to overcome the presumption of confidentiality.

Evidence Code section 917 provides at subdivision (a) "Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, *psychotherapist-patient, clergy-penitent,* husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, *the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.*" (Italics added.)

Thus, in this context, the privilege-claimant "has the *initial burden* of proving the *preliminary facts* to show the privilege applies." (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014, 135 Cal.Rptr.2d 532, italics added.)[12] "Once the claimant establishes the preliminary facts . . . , *the burden of proof shifts to the opponent of the privilege.* To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).] . . . Alternatively,

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[12] Thus, for example, where the psychotherapist-patient privilege is claimed, " '[p]reliminary facts' means the existence of a psychotherapist-patient relationship, 'that is, that the person [the claimant] consulted was a " 'psychotherapist' " within the meaning of . . . section 1010, and [the claimant] was a " 'patient' " within the meaning of . . . section 1011.' [Citation.]" (*Story v. Superior Court, supra,* 109 Cal.App.4th at p. 1014, 135 Cal.Rptr.2d 532.)

the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912[13]. . . . " (*Id.* at p. 1015, 135 Cal.Rptr.2d 532, italics added.)

c. *Standard of review.*

We review the trial court's privilege determination under the substantial evidence standard. "'"When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations]."' [Citation.] Accordingly, unless a claimed privilege appears as a matter of law from the undisputed facts, an appellate court may not overturn the trial court's decision to reject that claim." (*HLC Properties, Limited v. Superior Court* (2005) 35 Cal.4th 54, 60, 24 Cal.Rptr.3d 199, 105 P.3d 560, fn. omitted.)

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[13] Evidence Code section 912, subdivision (a), provides: "Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

d. *Development of California's clergy-penitent privilege.*

"The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive clerical consolation in return." (*Trammel v. United States* (1980) 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186.) "The present day clergy-penitent privilege has its origin in the early Christian Church sacramental confession which existed before the Reformation in England. It has evolved over the years into the contemporary 'minister's' privilege adopted in some form in virtually every state of this country. (Yellin, *The History and Current Status of the Clergy-Penitent Privilege* (1983) 23 Santa Clara L.Rev. 95.)" (*People v. Edwards* (1988) 203 Cal.App.3d 1358, 1362-1363, 248 Cal.Rptr. 53.)

As noted, California's clergy-penitent privilege is contained in Evidence Code sections 1030-1034. Before these sections were enacted in 1965, the privilege was defined by Code of Civil Procedure section 1881, subdivision (3), which provided "A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the *confession*, be examined as to any *confession* made to him in his professional character in the course of discipline enjoined by the church to which he belongs." (Italics added.) The current statute makes no reference to confessions, and instead provides an evidentiary privilege for "'penitential communication.'" (Evid.Code, § 1032.)

e. *For clergy-penitent privilege to attach, requirements of Evidence Code section 1032 must be satisfied.*

The central provision of California's clergy-penitent privilege is Evidence Code section 1032, which defines a penitential communication as a confidential communication made to a clergy person who is authorized to hear and obligated to keep secret such communications.

However, even with the privilege centered on a "communication," rather than on a "confession," not every statement made to a member of the clergy is privileged. "In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: 1) *it must be intended to be in confidence;* 2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and 3) such member of the clergy *has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret.* (§ 1032; 2 jefferson, cal. evidence benchbook (2d ed.1982) § 39.1, pp. 1405-1407.)" (*People v. Edwards, supra,* 203 Cal.App.3d at pp. 1362-1363, 248 Cal.Rptr. 53, italics added.)

f. *Petitioners' theory as to why clergy-penitent privilege is applicable.*

Mindful of the criteria of Evidence Code section 1032 requiring a communication to be made in confidence, in the presence of no third person, to a member of the clergy who is authorized to hear the communication and who, under the tenets of the church, has a duty to keep said communication secret, the petitioners invoke the Roman Catholic church's formation of clergy doctrine. They

presented evidence below showing that pursuant to this religious doctrine, a bishop is charged with the obligation to care for the physical, spiritual, emotional and psychological well-being of the priests within his diocese. Further, the obligation imposed by this doctrine includes intervention with priests who are experiencing problems related to celibacy and sexuality, including an "intervention interview" with the accused priest. The evidence also showed the Los Angeles Archdiocese encouraged priests to discuss such problems with Cardinal Mahony and the Vicar for Clergy.

The Archdiocese argues the challenged subpoenaed documents fall within California's clergy-penitent privilege because they were confidential communications made in the course of troubled-priest interventions, and under the tenets of the Church, Cardinal Mahony and the Vicar for Clergy were authorized to hear the communications and obligated to keep them secret. The Archdiocese also presented evidence the interventions with troubled priests depend on the troubled priests' understanding the communications will be held in confidence *within the Church.*

g. *Subject communications do not meet criteria of Evidence Code section 1032.*

Petitioners' theory conflicts with Evidence Code section 1032, which defines a "penitential communication" as "a communication made in confidence, *in the presence of no third person* so far as the penitent is aware," to a clergy person who must keep the communication secret. (Italics added.)

The record demonstrates the participants in the Archdiocese's troubled-priest interventions knew any

communications likely were to be shared with more than one person. According to the Archdiocese's declared policy, priests experiencing psychological and sexual problems were encouraged to discuss those problems with the Archbishop and the Vicar for Clergy. Furthermore, the subpoenaed documents themselves amply demonstrate that communications to and from the individual priests were routinely shared by Cardinal Mahony, whoever happened to be the current Vicar for Clergy, and sometimes other Archdiocese employees as well.

This sharing of information violates Evidence Code section 1032's requirement that the penitent's communication be "made in confidence, in the presence of no third person so far as the penitent is aware," to a cleric who is obligated "to keep those communications secret." The fact both parties to the original communication knew it likely would be transmitted to a third person vitiated ab initio any privilege under Evidence Code section 1032, or, alternatively, constituted a waiver of the privilege under Evidence Code section 912, subdivision (a).[14]

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[14] Under Evidence Code section 912, subdivision (a), the clergy-penitent privilege is waived if a holder of the privilege discloses a significant part of the communication or consents to such disclosure.

Under Evidence Code section 912, subdivision (d), "A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege), *when disclosure is reasonably necessary for the accomplishment of the purpose* for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, *is not a waiver of the privilege.*" (Italics added.) *Notably, the clergy-penitent relationship is missing from the enumerated*

(Continued on following page)

Here, the record demonstrates the District Attorney met the burden of rebutting Evidence Code section 917's presumption of confidentiality by proving the priests were aware the communications were likely to be transmitted to third persons.

The Archdiocese argues these communications were not transmitted "to any third party, that is, someone outside of the bishop (or his alter ego, the Vicar for Clergy)." The contention is unavailing. We reject the argument that just because Cardinal Mahony considers the Vicar for Clergy his surrogate for dealing with troubled priests, there was no violation of Evidence Code section 1032's requirement that the communication be "made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who . . . has a duty to keep those communications secret."

With respect to the various documents here in issue, discussed *infra,* the referee held *none* was shielded by the clergy-penitent privilege. Guided by the principles set forth above, we uphold the referee's rulings in their entirety as follows.

Doe 1 # 16-17: This is a letter from Cardinal Mahony to a priest. The referee reasonably could conclude the three numbered subparagraphs of this letter did not constitute penitential communications because they merely notified the priest of certain administrative decisions made by the Archdiocese. In any event, the entire letter is not covered by the clergy-penitent privilege because it was not sufficiently confidential. Not only did

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relationships that benefit from this "reasonably necessary disclosure" rule.

the priest know such communications were likely to be shared with the Vicar for Clergy, but the letter itself announced a copy was being sent to the Vicar.

Doe 1 # 50-52: This document consists of a letter from a priest to the Vicar for Clergy, and a cover memorandum from the Vicar transmitting the priest's letter to Cardinal Mahony. The referee reasonably could conclude the letter was not within the clergy-penitent privilege because it merely discussed administrative actions taken by the Archdiocese, asked for legal information and suggested future job assignments. Furthermore, the letter was not sufficiently confidential to constitute a penitential communication because the priest knew it was likely to be shared with a third person. Further, the cover memorandum does not constitute a penitential communication because it does not contain any information transmitted to or from the priest.

Doe 1 # 80: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, reporting on a conversation with a priest. The referee reasonably could conclude this document did not constitute a penitential communication because it merely reported on the priest's cooperation with his therapists, strategized about possible legal problems and discussed church assignments. Moreover, the letter was not within the clergy-penitent privilege because it was not sufficiently confidential in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 1 # 397-400: This document consists of dated file notes containing summaries and verbatim excerpts from other subpoenaed documents:

The December 24, 1986, entry is a summary of Doe 1 # 16-17, which we have concluded does not fall within the clergy-penitent privilege. The same result applies to this summary of that document.

The June 22, 1987, entry is a summary of Doe 1 # 80, which we have concluded does not fall within the clergy-penitent privilege. The same result applies to this summary of that document.

Doe 2 # 13: This is a letter to Cardinal Mahony's predecessor from an official of the Archdiocese then responsible for ministering to troubled priests. The referee reasonably could conclude this document did not constitute a penitential communication because it merely related an event in the priest's personal history.

Doe 2 # 23: This is a memorandum to the file, written by the Vicar for Clergy, reporting on a third person's observation and evaluation of a priest's conduct in a particular situation. The referee reasonably could conclude this document did not constitute a penitential communication because it merely related an event in the priest's personal history.

Doe 2 # 31-32: This is a memorandum from the Vicar for Clergy to Cardinal Mahony. The Archdiocese is only objecting to two paragraphs of this document. The third paragraph merely repeats communications, contained in Doe 2 # 13 and Doe 2 # 23, which we have concluded do not fall within the clergy-penitent privilege. The same result applies to this summary of those documents. The referee reasonably could conclude the information contained in the seventh paragraph of the memorandum did not constitute a penitential communication because it merely related an incident in the priest's personal history.

In any event, the entire memorandum was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 34: This is a memorandum from a member of the Vicar for Clergy's staff to the Vicar for Clergy. A copy of the memorandum was transmitted to another member of the Vicar for Clergy's staff. The referee reasonably could conclude the document was not a penitential communication because it merely related incidents in the priest's personal history and offered an evaluation of the priest's situation. The document does not constitute a penitential communication because it does not contain any information transmitted to or from the priest. In any event, the memorandum was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 79: This is a letter from Cardinal Mahony to a priest, responding to a letter from the priest. A copy of Cardinal Mahony's letter was transmitted to the Vicar for Clergy. The letter was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 140: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, advising him of a conversation a member of the Vicar's staff had with a priest and the priest's psychotherapist. The referee reasonably could conclude this document did not constitute a penitential communication because it was merely a status report concerning the priest's progress in psychotherapy. In any

event, the document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 172: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, discussing the establishment of an aftercare program for when a priest completes psychotherapy. The document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person. The document does not constitute a penitential communication because it does not contain any information transmitted to or from the priest.

Doe 2 # 183: This is a letter from the Vicar for Clergy to a priest. The referee reasonably could conclude the document did not constitute a penitential communication because it was largely taken up with administrative matters and any penitential aspect was insignificant. Moreover, the document was not sufficiently confidential to constitute a penitential communication in that the parties to the communication knew it likely would be transmitted to a third person.

Doe 2 # 278: This document consists of excerpts from three of the documents discussed above (Doe 2 # 140, # 172 & # 183), which we have concluded do not fall within the clergy-penitent privilege. The same result applies to these excerpts of those documents.

In sum, we conclude that none of the particular subpoenaed documents challenged by the Archdiocese falls within California's clergy-penitent privilege, and we affirm *all* of the referee's rulings in this regard.

3. *Application of psychotherapist-patient privilege to Archdiocese's claims regarding particular documents; the communication must be "reasonably necessary" to accomplish the purpose for which the psychotherapist was consulted.*

a. *Controlling statute: Evidence Code section 1012.*

California's psychotherapist-patient privilege provides that a "'confidential communication between patient and psychotherapist' means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Evid.Code, § 1012, italics added.)[15]

b. *Petitioners' theory why the psychotherapist-patient privilege is applicable to the disputed documents.*

Similar to their arguments for the application of the clergy-penitent privilege, petitioners assert that certain communications made in the context of the formation of

[15] With respect to the parties' respective burdens of proof and the standard of review, the discussion in the previous section, relating to the clergy-penitent privilege, is equally applicable here.

clergy process are privileged pursuant to the psychotherapist-patient privilege.

Petitioners acknowledge the statutory language requiring that information communicated in psychotherapy not be disclosed to third persons other than those necessary to further the interests of the patient in the consultation. They argue that disclosures to third parties were duly made as reasonably necessary to accomplish the purpose of the psychotherapy, namely, diagnosis and treatment of issues relating to celibacy and sexuality, and therefore remain confidential within the meaning of Evidence Code section 1012.

c. *Case law interpretation of Evidence Code section 1012; to remain privileged, disclosure to third persons must be in furtherance of the purpose for which the psychotherapist was consulted, namely, diagnosis and treatment of the patient.*

To reiterate, Evidence Code section 1012 defines a confidential communication between patient and psychotherapist as information transmitted between a patient and his or her psychotherapist in the course of that relationship, which information is disclosed "to no third persons other than those who are present to further the interest of the patient in the consultation, *or those to whom disclosure is reasonably necessary* for the transmission of the information or *the accomplishment of the purpose for which the psychotherapist is consulted,* and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (Italics added.)

The *purpose* for which a psychotherapist is consulted is set forth in Evidence Code section 1011, which defines "patient" as "a person who consults a psychotherapist or submits to an examination by a psychotherapist *for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition* or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems." (Italics added.)

There is ample case law illustrating disclosures to third persons which are "reasonably necessary" for the accomplishment of the *purpose* for which the psychotherapist was consulted. (Evid.Code, § 1012.)

In *Grosslight v. Superior Court* (1977) 72 Cal.App.3d 502, 140 Cal.Rptr. 278, the issue presented was whether the plaintiff in a personal injury action was entitled to discovery of a minor-defendant's psychiatric hospital records, on the theory the records might contain statements made by the minor's parents to the hospital staff indicating the parents had knowledge of the minor's propensities for violence. (*Id.* at p. 504, 140 Cal.Rptr. 278.)

Grosslight held such communications between parent and hospital were shielded by the psychotherapist-patient privilege because they were made "for the purpose of furthering the child's interest in communicating with the psychotherapist and . . . *to facilitate the diagnosis and treatment of the child.*" (*Id.* at p. 506, 140 Cal.Rptr. 278, italics added.) *Grosslight* reasoned "Although the [patient] at 16 or 17 is clearly old enough verbally to communicate with her doctors, the nature of her problem is psychiatric, and it is entirely possible that her psychiatric illness precludes objective, accurate and complete communication

by her with hospital personnel without the cooperation of her parents." (*Id.* at p. 507, 140 Cal.Rptr. 278.) Thus, any parental communication *to the hospital staff* in *Grosslight* would be privileged because it was made to assist in the diagnosis and treatment of the patient.

In *People v. Gomez* (1982) 134 Cal.App.3d 874, 185 Cal.Rptr. 155, the defendant contended that statements he made to students serving as interns with the family court services office were privileged. (*Id.* at p. 880, 185 Cal.Rptr. 155.) *Gomez* rejected that argument, noting the psychotherapist-patient privilege extended to virtually every licensed classification of "therapist" but did not apply to student interns. (*Id.* at pp. 880-881, 185 Cal.Rptr. 155; see Evid. Code, § 1010.)[16] *Gomez* went on to state, however, that under some circumstances, communications to student interns could be privileged if the students were working "*under the supervision of a licensee to whom the privilege does attach* [citation]." (*Id.* at p. 881, fn. 3, 185 Cal.Rptr. 155, italics added.)

In *Luhdorff v. Superior Court* (1985) 166 Cal.App.3d 485, 212 Cal.Rptr. 516, the prosecution sought access to written records relating to conversations between a defendant and a clinical social worker, one Gramajo. (*Id.* at p. 487, 212 Cal.Rptr. 516.) Gramajo was not a therapist to whom the privilege attached but "he worked under such a person generally, and [defendant's] case was ultimately *controlled and supervised by persons to whom the privilege attached.*" (*Id.* at p. 490, 212 Cal.Rptr. 516, italics added.) *Luhdorff* was guided by "[t]he language of [Evidence Code]

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[16] Evidence Code section 1010 defines persons who are phychotherapists for purposes of the psychotherapist-patient privilege.

section 1012 [which] plainly indicates that communications made by patients to persons *reasonably necessary to assist psychiatrists and psychologists in the treatment of the patient's mental disorder* come within the privilege." (*Id.* at p. 489, 212 Cal.Rptr. 516, italics added.) *Luhdorff* concluded "Gramajo clearly falls within the category of persons reasonably necessary for the transmission of information or the accomplishment of the purpose for which the psychotherapist is consulted." (*Id.* at p. 490, 212 Cal.Rptr. 516.)

In *Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521, 250 Cal.Rptr. 25, the question presented was "whether communications made by a patient to other persons participating in a group therapy session [conducted by a counselor at a state hospital] come within the psychotherapist-patient privilege." (*Id.* at p. 527, 250 Cal.Rptr. 25.)

Farrell L. reasoned "the other participants in a group therapy session are those who are present *to further the interest of the patient in the consultation . . . or the accomplishment of the purpose for which the psychotherapist is consulted* . . . . " (Evid.Code, § 1012.) The language of Evidence Code section 1012 plainly indicates that communications made by patients to persons who are present to further the interests of the patient come[] within the privilege. 'Group therapy' is designed to provide comfort and revelation to the patient who shares similar experiences and/or difficulties with other like persons within the group. The presence of each person is for the benefit of the others, including the witness/patient, and is designed to facilitate the patient's treatment. Communications such as these, when made in confidence, should not operate to

destroy the privilege." (*Farrell L., supra,* 203 Cal.App.3d at p. 527, 250 Cal.Rptr. 25, italics added.)

In *In re Pedro M.* (2000) 81 Cal.App.4th 550, 96 Cal.Rptr.2d 839, the juvenile court ordered a minor to "'[c]ooperate in a plan for psychiatric, psychological testing or treatment." (*Id.* at p. 553, 96 Cal.Rptr.2d 839.) The minor subsequently contended the juvenile court erroneously admitted the testimony of his therapist after he invoked the psychotherapist-patient privilege. (*Id.* at p. 554, 96 Cal.Rptr.2d 839.) *Pedro M.* concluded said privilege did not preclude the therapist from testifying at the adjudication of the supplemental petition concerning the minor's participation and progress in the court-ordered treatment plan. (*Id.* at p. 555, 96 Cal.Rptr.2d 839.)

Pedro M. explained "Evidence Code section 1012 itself permits disclosure of a confidential communication between patient and psychotherapist to *'those to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted . . . .'* In our view, this would include the juvenile court, where the patient is a delinquent minor who has been properly directed to participate and cooperate in a sex offender treatment program in conjunction with a disposition order placing the minor on probation." (*In re Pedro M., supra,* 81 Cal.App.4th at p. 554, 96 Cal.Rptr.2d 839, italics added.)

In re Mark L. (2001) 94 Cal.App.4th 573, 114 Cal.Rptr.2d 499 held "[t]he rationale of *In re Pedro M., supra,* 81 Cal.App.4th 550, 96 Cal.Rptr.2d 839, is applicable in the juvenile dependency context, in which therapy has a dual purpose – treatment of the child to ameliorate the effects of abuse or neglect and the disclosure of information

from which reasoned recommendations and decisions regarding the child's welfare can be made. As the Supreme Court has observed, '[w]ithout the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court.' (*In re Jasmon O.* (1994) 8 Cal.4th 398, 430 [33 Cal.Rptr.2d 85, 878 P.2d 1297].)" (*Id.* at p. 584, 33 Cal.Rptr.2d 85, 878 P.2d 1297.)

Most recently, in *In re Christopher M.* (2005) 127 Cal.App.4th 684, 26 Cal.Rptr.3d 61, the juvenile court placed the defendant on probation subject to numerous conditions, including conditions requiring that all records related to his medical and psychological treatment be made available upon request to the court and to the probation department. (*Id.* at pp. 687, 690, 26 Cal.Rptr.3d 61.) Defendant contended said conditions of probation violated the psychotherapist-patient privilege. (*Id.* at p. 695, 26 Cal.Rptr.3d 61.)

Christopher M. rejected the argument, explaining the express language of Evidence Code section 1012 "permits disclosure of otherwise privileged communications between patient and psychotherapist to third persons to whom disclosure is *reasonably necessary to accomplish the purpose* for which the psychotherapist is consulted." (*In re Christopher M., supra,* 127 Cal.App.4th at p. 696, 26 Cal.Rptr.3d 61, italics added.) *Christopher M.* observed "Here, by reasonably limiting disclosure of otherwise privileged psychotherapist-patient communications to the probation officer and the court, the court acted under the authority of Evidence Code section 1012 and avoided unnecessary disclosure of those communications." (*Ibid.*)

Additionally, we briefly look to case law relating to the physician-patient privilege, which is analogous to the psychotherapist-patient privilege.[17]

In *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 114 Cal.Rptr. 603, 523 P.2d 643, the plaintiff sued drug manufacturers for damages for injuries allegedly caused by a defective drug. (*Id.* at p. 927, 114 Cal.Rptr. 603, 523 P.2d 643.) Defendants refused to produce their records containing adverse drug reaction reports on the ground that such reports constituted confidential communications by various physicians and that their production would be violative of the physician-patient privilege. (*Ibid.*)

Rudnick explained "The 'disclosure in confidence [by the physician] of a communication that is protected by [the] (physician-patient privilege) . . . *when such disclosure is reasonably necessary for the accomplishment of the purpose for which the* . . . physician . . . was consulted, is not a waiver of the privilege.' [Citation.] Thus, for example, if the physician reported to defendants the adverse effects of the drug on his patient so as to obtain assistance in the use of the drug in treating the patient, such disclosure even if consented to by the patient would not constitute a waiver of

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[17] Evidence Code section 992 provides: "As used in this article, confidential communication between patient and physician means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is *reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted*, and includes a diagnosis made and the advice given by the physician in the course of that relationship." (Italics added.)

the privilege." (*Rudnick v. Superior Court, supra,* 11 Cal.3d at pp. 930-931, 114 Cal.Rptr. 603, 523 P.2d 643, italics added.)

In *Blue Cross v. Superior Court* (1976) 61 Cal.App.3d 798, 132 Cal.Rptr. 635, the trial court entered a discovery order directing a prepaid health care plan to furnish plaintiff with information relating to other Blue Cross subscribers who had filed claims for psoriasis treatment. (*Id.* at pp. 799-800, 132 Cal.Rptr. 635.) The reviewing court ordered issuance of a peremptory writ of mandate directing the trial court to vacate its discovery order. It explained "All parties agree that the patients' names and ailments were disclosed to Blue Cross for the purpose of paying the doctor's fees. Disclosure, then, was '*reasonably necessary for . . . the accomplishment of the purpose for which the physician [was] consulted;* confidentiality was not lost and the privilege not waived." (*Id.* at pp. 801-802, 132 Cal.Rptr. 635, italics added.)

Guided by these authorities, we review the trial court's determination as to the applicability of the psychotherapist-patient privilege to the challenged documents.

d. *Application of Evidence Code section 1012 to Archdiocese's claims regarding particular documents.*

With respect to the various documents here in issue, discussed *infra,* the referee held *none* was shielded by the psychotherapist-patient privilege. Pursuant to the principles set forth above, we uphold the referee's rulings, with one exception.

Doe 1 # 50-52: This document consists of a letter from a priest to the Vicar for Clergy, and a cover memorandum

from the Vicar transmitting the letter to Cardinal Mahony. The Archdiocese only claims that the cover memorandum, which recites a psychotherapist's recommendation about the priest taking a trip abroad, is protected by the psychotherapist-patient privilege. However, the referee reasonably could conclude the transmission of this information to the Archdiocese did not come within the "furtherance of the purpose" rule of Evidence Code section 1012, because any connection to furthering the priest's treatment was too attenuated. Moreover, neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 1 # 74: This is a memorandum to the file, by the Vicar for Clergy, reporting on treatment recommendations transmitted by a priest's psychotherapists. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because the Vicar was not involved in rendering psychotherapy to the priest, nor was he being supervised by a treating psychotherapist.

Doe 1 # 80: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, reporting on a conversation the Vicar had with a priest regarding psychotherapy recommendations and future work assignments for the priest. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 1 # 397-400: This document consists of dated file notes containing summaries and verbatim excerpts from other subpoenaed documents:

The January 9, 1987, entry is essentially a copy of a psychotherapeutic report prepared by a priest's therapists. The report contains a detailed psycho-sexual history and diagnosis. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because no person at the Archdiocese was involved in rendering psychotherapy to the priest, or was being supervised by a treating psychotherapist.

The June 22, 1987, entry is a summary of Doe 1 # 80, which we have concluded must be produced to the grand jury. The same result applies to this summary of that document.

The September 6, 1996, entry is essentially a copy of a psychotherapeutic evaluation sent by a priest's therapists to a member of the Vicar for Clergy's staff. This evaluation contains both a diagnosis and treatment recommendations. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because the Vicar for Clergy's staff was not involved in rendering psychotherapy to the priest, nor was that staff being supervised by a treating psychotherapist.

The March 5, 1999, entry is essentially a copy of a file note prepared by a member of the Vicar for Clergy's staff, reporting on a discussion he had with a priest. The document describes the priest's self-report concerning his level of functioning, his progress in therapy and his desires concerning future work assignments. This communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because it does not convey any significant psychological information. Moreover, the Vicar for Clergy's staff was not involved in rendering

psychotherapy to the priest, nor was it being supervised by a treating psychotherapist.

Doe 2 # 46: This is the sole item as to which we overturn the referee's ruling because the "claimed privilege appears as a matter of law from the undisputed facts." (*HLC Properties, Limited v. Superior Court, supra,* 35 Cal.4th at p. 60, 24 Cal.Rptr.3d 199, 105 P.3d 560.) This document is a memorandum from a member of the Vicar for Clergy's staff to a priest's psychotherapists. Said memorandum supplied the therapeutic team with information about a troubled priest's personal history as an aid to diagnosis and treatment. The record reflects such background information was routinely provided to assist the psychotherapists in diagnosing and treating the priests. Under the reasoning of *Grosslight v. Superior Court, supra,* 72 Cal.App.3d at pp. 506-507, 140 Cal.Rptr. 278, we conclude this document is appropriately shielded by the psychotherapist-patient privilege because it was a disclosure reasonably necessary to accomplish the purpose for which the psychotherapist was consulted, namely, diagnosis and treatment of the patient. (Evid.Code, § 1012.) The inclusion of such material within the purview of the privilege "encourages full disclosure of pertinent matters that otherwise might be withheld by [third persons] to the detriment of the patient." (*Grosslight, supra,* 72 Cal.App.3d at p. 507, 140 Cal.Rptr. 278.) Therefore, we overrule the referee's order that this particular document be produced.

Doe 2 # 140: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, advising him of a conversation a member of the Vicar's staff had with a priest and the priest's psychotherapist. Although the document is ostensibly a status report on the priest's progress in therapy,

the referee reasonably could conclude it was not covered by the psychotherapist-patient privilege because it did not contain any significant psychological information. Moreover, this communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 2 # 172: This is a memorandum from the Vicar for Clergy to Cardinal Mahony, discussing possible aftercare programs for a priest when he completes psychotherapy. The referee reasonably could conclude it was not covered by the psychotherapist-patient privilege because it did not contain any significant psychological information. Moreover, this communication does not fall within the "furtherance of the purpose" rule of Evidence Code section 1012 because neither party to this communication was a psychotherapist or someone being supervised by a treating psychotherapist.

Doe 2 # 278: This document consists of dated file notes containing excerpts from two of the documents discussed above. We have concluded that neither Doe 2 # 140 nor Doe 2 # 172 falls within the psychotherapist-patient privilege. The same result applies to these excerpts of those two documents.

In sum, we conclude that, *except for Doe 2 # 46,* none of the particular subpoenaed documents challenged by the Archdiocese falls within California's psychotherapist-patient privilege, and we affirm all of the referee's rulings in this regard. We order that Doe 2 # 46 not be turned over [sic] the grand jury.

4. *Attorney-client and attorney work product privileges are inapplicable.*

The Archdiocese contends some of the disputed documents should not be disclosed to the grand jury because they are protected either by the attorney-client privilege or by the attorney work product privilege. This claim is without merit.

Noting the referee concluded "the communications at issue [had] been made for multiple purposes," the Archdiocese argues that if any of the disputed documents were generated by "investigations of crime or communications to ascertain the validity of charges, as Respondent court asserts, then they should be protected by the Work Product Doctrine and/or the Lawyer-Client Privilege in addition to the First Amendment and Clergy Privilege."

However, the Archdiocese is confusing two different issues: (1) the referee's conclusion, in connection with his general ruling on the First Amendment and clergy-penitent privilege claims, that the Archdiocese had mixed motives for intervening with priests accused of sexual misconduct, and (2) the referee's rulings on the individual documents at issue in this writ proceeding. None of the remaining disputed documents falls within either the attorney-client or the attorney work product privileges.

Under Evidence Code section 952, the attorney-client privilege protects "information transmitted between a client and his or her lawyer in the course of that relationship . . . and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." "'In California the [attorney-client] privilege has been held to encompass not only oral or written statements, but additionally actions, signs, or other means of

communicating information. . . . '" (*Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 457, 107 Cal.Rptr.2d 456.) Under Code of Civil Procedure section 2018, subdivision (c), "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances."

The Archdiocese's attorney is referred to only twice in the 15 documents that remain in dispute. Doe 2 # 31 refers to particular advice given by the attorney to the Vicar for Clergy, but this reference appears in one of the paragraphs of Doe 2 # 31 that is *not* being disputed by the Archdiocese. In Doe 1 # 50, the Vicar for Clergy refers to the attorney, but only to mention counsel's presence at a meeting during which Cardinal Mahony made a particular statement. There is no indication Cardinal Mahony's statement reflects any of the attorney's thought processes.

There is no indication any of the 15 disputed documents constitutes information transmitted between the Archdiocese and its lawyer.

Hence, none of the disputed documents falls within either the attorney-client or the attorney work product privilege.

5. *The Stogner decision does not invalidate the subpoenas.*

In 1993 the Legislature enacted Penal Code section 803, subdivision (g), in order to expand the statute of limitations in child molestation cases. *Stogner v. California, supra,* 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, held this statute violated the ex post facto clause when used to revive prosecutions already time-barred before the statute was enacted. The Priests contend the grand jury

subpoenas duces tecum violate the principles of *Stogner* because the subpoenas encompass documents that are irrelevant to crimes allegedly occurring after January 1988, and because, properly understood, *Stogner* prohibits prosecution of any child molestation crime committed before January 1, 1994.[18] These claims are without merit.

The first claim fails because admissible 'other crimes' evidence is not restricted by the statute of limitations. (See Evid.Code, §§ 1101, subd. (b), & 1108.)[19] As the Priests themselves acknowledge, "neither Evidence Code section 1101(b) nor 1108 is a chargeable offense. They are merely rules of admissibility for evidence at trial."

The second claim is unavailing because it misconstrues *Stogner,* which stated "[W]e agree that the State's interest in prosecuting child abuse cases is an important one. But there is also a predominating constitutional interest in forbidding the State to revive a long-forbidden prosecution. And *to hold that such a law is ex post facto does not prevent the State from extending time limits* for the prosecution of future offenses, or *for prosecutions not yet time barred.*" (*Stogner v. California, supra,* 539 U.S.

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[18] Penal Code section 803, subdivision (g), came into effect on January 1, 1994. The statute of limitations for child molestation cases is six years (Pen.Code, §§ 800, 805, subd. (a)).

[19] Under Evidence Code section 1101, subdivision (b), "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402, 27 Cal.Rptr.2d 646, 867 P.2d 757.) Evidence Code section 1108 provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible [by the rule excluding propensity evidence]."

607 at p. 633, 123 S.Ct. 2446, 156 L.Ed.2d 544, italics added.)

Hence, the Priests' argument already has been firmly rejected by a number of courts which have recognized the difference between extension statutes and revival statutes. (See *People v. Terry* (2005) 127 Cal.App.4th 750, 775, 26 Cal.Rptr.3d 71 ["As *Stogner* indicates, extensions of existing, unexpired limitations periods are not ex post facto because such extensions do not resurrect otherwise time barred prosecutions."]; accord *People v. Vasquez* (2004) 118 Cal.App.4th 501, 13 Cal.Rptr.3d 162; *People v. Superior Court (German)* (2004) 116 Cal.App.4th 1192, 10 Cal.Rptr.3d 893; *People v. Renderos* (2003) 114 Cal.App.4th 961, 8 Cal.Rptr.3d 163; *People v. Robertson* (2003) 113 Cal.App.4th 389, 6 Cal.Rptr.3d 363).

6. *No showing District Attorney impermissibly usurped grand jury authority.*

The Priests contend none of the subpoenaed documents may be disclosed because the District Attorney improperly usurped the grand jury's authority. This claim also is without merit.

The Priests assert the District Attorney openly declared he was using the grand jury to conduct "private" discovery for his own purposes that had nothing to do with any pending grand jury investigation, and that the referee improperly acquiesced in this manipulation of the grand jury process. We cannot agree.

This claim is based on a misreading of the District Attorney's oral argument to the referee and a misperception about the proper scope of a grand jury investigation,

which "'"is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning."'" (*M.B. v. Superior Court, supra,* 103 Cal.App.4th at pp. 1394-1395, 127 Cal.Rptr.2d 454.)

Contrary to the Priests' assertion the District Attorney was allowed to subvert the grand jury process, the record shows the referee rejected the District Attorney's argument he should be allowed to present, at the pre-indictment stage of a grand jury proceeding, evidence that would be inadmissible at trial.

The Priests complain that, although the District Attorney "may be present to advise the grand jury and conduct examination of witnesses for the grand jury, . . . he may not take the evidence he is exposed to in that capacity to use for other purposes outside the grand jury." But the Priests point to no evidence indicating such a thing happened here. They merely argue it can be *inferred* from the District Attorney's oral argument to the referee that the District Attorney *believed* he could do this. We do not agree with the Priests' interpretation of the District Attorney's comments. In any event, something more than bad thoughts would have to be demonstrated to sustain this claim.

7. *Subpoenas were not impermissibly vague.*

The Priests contend the subpoenas were defective because they were overbroad as to time, place and conduct,

and imprecise in their description of the items to be produced. Again, these claims are without merit.

Although "[t]he Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search," in order to prevent police from rummaging through someone's belongings, a search warrant "need only be reasonably specific, rather than elaborately detailed, and the specificity required varies depending on the circumstances of the case and the type of items involved.' [Citation.]" (*U.S. v. Bridges* (9th Cir.2003) 344 F.3d 1010, 1016-1017.)

The subpoenas here requested "[a]ll documents and other materials that are in the possession, custody, or control of the Archdiocese of Los Angeles that relate in any way to allegations of child molestation or sexual abuse committed by Father. . . . [¶] The subpoenaed documents and other materials *include, but are not limited to,* documents in the Archdiocese general archives, general files, secret archives, secret files,. . . . " (Italics added.)

The Priests contend the subpoenas amounted to unconstitutional general warrants because their descriptions of the items to be produced were impermissibly vague. They argue that the "include, but are not limited to" language is precisely the kind of overbroad language found to have invalidated a search warrant in *U.S. v. Bridges, supra.* But a crucial defect in *Bridges* was that the search warrant nowhere stated what criminal activity was being investigated. "In light of the expansive and open-ended language used in the search warrant to describe its purpose and scope, *we hold that this warrant's failure to specify what criminal activity was being investigated,* or suspected of having been perpetrated, *renders its*

legitimacy constitutionally defective." (*U.S. v. Bridges, supra,* 344 F.3d at p. 1016.) There is no such problem in this case.

The Priests contend the subpoenas were impermissibly overbroad as to time because they effectively asked for every personnel document since the Priests had been incardinated in the Archdiocese. As we pointed out above, however, the admissibility of other crimes evidence under Evidence Code sections 1101 and 1108 means relevant evidence could be discovered by such requests.

As to place, the Priests complain the subpoenas are not limited to crimes committed in Los Angeles County in compliance with Penal Code section 917, which provides "[t]he grand jury may inquire into all public offenses committed or triable within the county. . . . " However, as the District Attorney points out, Penal Code section 784.7, subdivision (a), allows a sex crime committed outside Los Angeles County to be joined with a Los Angeles County sex crime, and then for the entire case to be prosecuted in Los Angeles County.[20] (See *People v. Betts* (2005) 34 Cal.4th 1039, 1059, 23 Cal.Rptr.3d 138, 103 P.3d 883 [section 784.7 "expands venue for specified offenses to permit crimes . . . that occurred in different counties to be tried in the same county"].)

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[20] Penal Code section 784.7, subdivision (a), provides, in pertinent part: "When more than one violation of Section 220, except assault with intent to commit mayhem, 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is in any jurisdiction where at least one of the offenses occurred, subject to a hearing, pursuant to Section 954, within the jurisdiction of the proposed trial."

As to conduct, the Priests contend "The term 'sexual abuse' is so vague and broad that a reasonable Custodian of Records might feel obliged to produce information pertaining to sexual conduct that is not criminal at all, such as verbal sexual harassment, [or] consensual sexual activity with an adult – one person's bawdy joke may be another person's 'sexual abuse.' Indeed, in the context of the Catholic clergy . . . even masturbation and sexual thoughts may be deemed to be sinful and abusive." However, there is no indication whatsoever the subpoenas were read in such a broad manner. Had they been, objections could have been made.

Moreover, this claim is based on a reading of the phrase "evidence of child molestation and sexual abuse" in which the word "child" does not modify "sexual abuse." This is not the only, or even the most natural, interpretation.

8. *Several grand jury issues already have been decided in prior appellate proceeding.*

The Priests raise several grand jury issues that were decided in our earlier opinion in this matter. They claim the grand jury did not have the power to issue subpoenas duces tecum and, if it did, these subpoenas were defective because they were unaccompanied by a good faith affidavit. These issues were decided in *M.B. v. Superior Court, supra,* 103 Cal.App.4th 1384, 127 Cal.Rptr.2d 454, and it is unnecessary to revisit them here.

9. *Priests' claims regarding particular documents are insufficiently presented and will not be addressed.*

The Priests contend some of the subpoenaed documents cannot be disclosed without violating the hearsay rule, the confidentiality of third persons named in the subpoenaed documents, the right of privacy, and the attorney-client, attorney work product, psychotherapist-patient, and clergy-penitent privileges. As to all of these claims, however, the Priests have failed entirely to specify which documents they are challenging. Their pleadings merely refer to "some of these records" and similarly vague characterizations.[21] This does not constitute adequate briefing. (Cf. *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99, 31 Cal.Rptr.2d 264 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived."].)

Nor have the Priests furnished this court with copies of any disputed documents. Hence, even assuming a privilege existed theoretically, we would be unable to determine that any particular subpoenaed document was in fact privileged. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296, 240 Cal.Rptr. 872, 743 P.2d 932 [failure to furnish adequate record on appeal mandates adverse ruling]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502, 93 Cal.Rptr.2d 97 [failure

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[21] For instance, regarding the psychotherapist-patient privilege, the Priests contend that "[*w*]ithin some of the files the Archdiocese intends to produce . . . are extremely private and intimate communications." (Italics added.) With regard to the clergy-penitent privilege, the Priests contend: "*Some of the items* within the command of the subpoenas include statements that are protected by this privilege. . . ." (Italics added.)

to provide adequate record on appeal triggers adverse ruling because appealed judgments are presumed correct].)

"A defendant seeking review of a ruling of the trial court by means of a petition for extraordinary writ must provide the appellate court with a record sufficient to permit such review. [Citations.]" (*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186, 154 Cal.Rptr. 917, 593 P.2d 862.) Because the Priests have failed to do so in this case, we decline to address their separate claims.

DISPOSITION

The order to show cause is discharged. The Archdiocese's objection to Doe 2 # 46 is sustained; this document will not be turned over to the grand jury. In all other respects, the petitions for writ of mandate, prohibition, or other appropriate relief are denied. All parties to bear their own costs in this proceeding. (Cal. Rules of Court, rule 56(*l*)(2).) The stay order is vacated.

CROSKEY and KITCHING, JJ., concur.

Court of Appeal, Second Appellate District,
Division Three – Nos. B177852/B180696
S136932

IN THE SUPREME COURT OF CALIFORNIA

En Banc
(Filed Nov. 16, 2005)

THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, Petitioner,

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent;

THE PEOPLE, Real Party in Interest.

And Related Case.

Petitions for review DENIED.

GEORGE
Chief Justice

No. 05-1017

IN THE
SUPREME COURT OF THE UNITED STATES

THE ROMAN CATHOLIC
ARCHBISHOP OF LOS ANGELES,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District, Division Three

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

THE ROMAN CATHOLIC
ARCHBISHOP OF LOS ANGELES,
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v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Real Party in Interest, the People of the State of California, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the California Court of Appeal's decision in this case.

STATEMENT OF THE CASE

For purposes of this Brief in Opposition, Real Party in Interest adopts the Procedural Background and Factual Background made in the opinion of the Court of Appeal of

the State of California, Second Appellate District, Division Three (A- 3 - A- 10), except as specifically stated below.

ARGUMENT

I. THERE IS NOTHING NEW OR CONTROVERSIAL IN THE ESTABLISHMENT CLAUSE DECISION IN THIS CASE

Rules of the United States Supreme Court, Rule 10 "Considerations governing review on certiorari" reads in pertinent part:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of the United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

A conference on church autonomy was recently held at the J. Rubin Clark Law School, Brigham Young University.

A lengthy article concerning sexual misconduct and ecclesiastical immunity was published as result of that conference. As succinctly stated in the Brigham Young article:

> Every American jurisdiction criminalizes, and makes tortious, sexual contact with persons below a specified age of consent. Ecclesiastical immunity has never barred criminal prosecution or civil actions for a religious leader's violation of these laws. The reasons are obvious. Few would be willing to defend such conduct by claiming that their religious commitments included sexual interaction between adults and minors, *or that a government investigation into such interaction would impermissibly entangle the state in religious matters. Were such defenses raised, courts would emphatically reject them on grounds that the public interest in protecting children vastly outweighs any claim of religious privilege, and that investigation and adjudication of the sexual abuse of children can proceed without state intrusion into questions of religious doctrine or governance.*

(Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1820, [Church Autonomy Conference February 6–7, 2004, J. Rubin Clark Law School, Brigham Young University: Church Autonomy and Religious Group Liability] (footnotes 109 and 110 omitted, emphasis added).)

The court below properly applied this Court's precedent as stated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), and as further explained by this Court in *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). (*Roman Catholic Archbishop of Los Angeles v. Superior Court*, 32 Cal. Rptr.

3d 209, 221-23, 131 Cal.App.4th 417, 434-36 (2005); A-18 – A-21.) In another state court case directly on point, *Society of Jesus of New England v. Commonwealth,* 808 N.E.2d 272, 441 Mass. 662 (2004) the Massachusetts Supreme Court rejected a claim that disclosure of a priest's personnel file pursuant to a grand jury subpoena in connection with a criminal prosecution for sexual assault would violate the establishment clause. There is no dispute in the law of the land concerning the appropriateness of issuing a grand jury subpoena for evidence of crimes in the possession of a religious entity. (*See People v. Campobello,* 810 N.E.2d. 307, 317, 348 Ill.App.3d 619 (2004); *Commonwealth v. Stewart,* 690 A.2d 195, 201–02, 547 Pa. 277, 289-91 (1997); *In re Grand Jury Subpoena Duces Tecum Served Upon Rabbinical Seminary,* 450 F.Supp. 1078, 1082 (E.D.N.Y. 1978); *Niemann v. Cooley,* 637 N.E.2d 943, 93 Ohio App. 3d 81 (1994).)

There is no conflict between federal authorities concerning the application of the establishment clause to neutral state laws seeking evidence of criminal conduct by clergymen and the decision in this case. For example, the Archdiocese attempts to rely on *Elvig v. Calvin Presbyterian Church,* 375 F.3d 951 (9th Cir. 2005), for the proposition that the ministerial exception to the establishment clause conflicts with the decision in this case. The United States Court of Appeals for the 9th Circuit sitting en banc refused to hear its decision in *Elvig* and stated:

> Our decisions in *Bollard* [*v. California Province of the Soc'y of Jesus, 196 F.3d 940* (9th. Cir. 1999)] and this case are fully consistent with the First Amendment and the "ministerial exception" to Title VII. Under *Bollard* and this case, a church may hire, fire, promote, refuse to promote, and prescribe the duties of its ministers, free from judicial scrutiny under Title VII. It need advance no justification, religious or otherwise, for such

> actions. *Bollard* and this case do, however, hold that sexual harassment by a minister is not protected by the First Amendment. A church is required to comply with Title VII when a minister is sexually harassed by another minister employed by the church, *just as a church is required to comply with state tort laws when a parishioner is sexually abused by a minister employed by the church.* In neither of these circumstances is a church protected by the First Amendment.

(*Elvig v. Calvin Presbyterian Church,* 397 F.3d 790, at 795 (9th Cir. 2005), emphasis added.)

Even the dissent in the en banc *Elvig* decision acknowledged that the church would not be exempt from state action in pursuit of crime.

> If the Archbishop of Canterbury had killed one of the king's knights or raped an alter boy, he would have faced trial under a murder or rape law of general applicability. That is not analogous to the case at bar because it has nothing to do with the church's employment decisions regarding its ministers. If the king had gotten rid of the Archbishop by instigating a nun's claim that his prayers and interpretations of religious doctrine about sin had created a hostile work environment for women, that would have been an employment discrimination claim analogous to the case at bar.

(*Id.* at 804 n.37 (Kleinfeld, J. dissenting).)

These grand jury subpoenas have nothing to do with the ministerial exception. They have everything to do with the dissent's comment that the Archbishop of Canterbury would not be exempt from the application of laws of general applicability if he had raped an alter boy. As Justice Kozinski stated in his concurring opinion in *Elvig*, "The ministerial

exception applies, if at all, based on the plaintiff's status as a minister." (*Id.* at p. 796.)

Likewise, the District Attorney's Office is interested only in documents that contain evidence of criminal sexual abuse of children. The critical question for this office is not whether the office of the Vicar for Clergy has a religious purpose, but rather whether the documents that office possesses contain evidence of crime. The criminal laws are neutral as concerns religion. Investigation of these crimes is no more invasive of a religious institution than of an educational institution or a health institution.

The Archdiocese also states that these grand jury subpoenas have caused priests to forego pastoral counseling. It is far more likely that the church's recently professed zero tolerance policy (Report to the People of God: Clergy Sexual Abuse 1930-2003, p. 20; PSA [Petitioner's Sealed Appendix filed in the court below] Ex. 72, p. 1950) and the addition of clergymen as mandated reporters of child abuse (Cal. Pen. Code section 11166; *Conley v. Roman Catholic Archbishop of San Francisco et al.*, 102 Cal. Rptr. 2d 679, 682-83, 85 Cal.App.4th 1126, 1132-33 (2000)[1]) had more to do with priests no longer coming forward than these subpoenas.

II. THE FREE EXERCISE ISSUE HAS BEEN DECIDED ON INDEPENDENT STATE GROUNDS

Much of the Archdiocese's petition has been devoted to what the Archdiocese characterizes as a controversy over the validity of the neutral law of general applicability test announced in *Employment Div., Dept. of Human Res. of Or. et al. v. Smith*, 494 U.S. 872 (1990) versus the compelling state interest balancing test of *Sherbert v. Verner*, 374 U.S.

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1. In *Conley v. Roman Catholic Archbishop of San Francisco et al., supra*, 85 Cal.App.4th 1126, the California Court of Appeal rejected the Church's contention that the reporting law violated the First Amendment's religion clauses. (*Id.* at 1132-33.)

398 (1963). However, the Archdiocese invited this Court to decide the free exercise claim based on California Constitution Article I, section 4, which provides that "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State." Based upon the California Supreme Court's decision in *Catholic Charities of Sacramento, Inc. v Superior Court*, 85 P.3d 67, 32 Cal.4th 527 (2004), (writ of certiorari denied at 543 U.S. 816 (2004)), the court below stated "we conclude that even if the pre-*Smith* compelling state interest test governs a California free exercise claim, that test is met here." (*Roman Catholic Archbishop v. Superior Court*, 32 Cal. Rptr. 3d at 225, 131 Cal.App.4th at 438; A-28.)

This Court has consistently stated:

> [T]his Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground, *see Herb v. Pitcairn*, 324 U.S. 117, 125–126, 65 S. Ct. 459, 89 L. Ed. 79 (1945), as it will if the state court's opinion "indicates clearly and expressly" that the state ground is an alternative holding, *see Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *see also Harris v. Reed*, 489 U.S. 255, 264, n.10, 109 S. Ct. 1038, 103 L. Ed. 2d 308, (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 80 L. Ed. 158 (1935).

(*Sochor v. Florida*, 504 U.S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) [holding that this Court would not address the heinousness factor of the Florida state death penalty law because the Florida Supreme Court had determined based on state law that the claim had not been preserved for appeal].)